

NEW JERSEY LAWYER



June 2022

No. 336

CLIMATE CHANGE AND NEW JERSEY'S ENERGY FUTURE

How New Jersey's New
Land Use Law Makes Way
for Electric Vehicles

PAGE 24

C-PACE Legislation Gets
a Major Upgrade, Serving
as a Catalyst for Meeting
New Jersey's Climate
Change Goals

PAGE 30



The true north for accuracy and dependability for over 110 years.



Since 1911, Charles Jones has been the pioneer in accurate, dependable public record searches. With solutions that mitigate risk and increase peace of mind, Charles Jones continues to lead the way in accuracy and reliability. To learn more, visit charlesjones.com or call 800-792-8888.

Embracing the past. Navigating the future.

Charles Jones
A DataTrace Company



Scan to view our solutions and services.

© 2018-2022 Charles Jones LLC and/or its affiliates. All rights reserved.



The New Jersey State Bar Association Insurance Program

Advised and
administered by



We put doctors &
lawyers
together.

USI Affinity is endorsed by the New Jersey State Bar Association for our expertise in designing affordable Health Insurance solutions for law firms.

Changes in health care law may impact you, your firm or your family. Finding affordable, quality coverage is now more important than ever — and that's where we come in.

The benefits specialists at USI Affinity are experts in Health Care Reform. We can help you design a health plan that provides the best coverage and value while ensuring you will be in compliance with complex new regulations and requirements.

Introducing the NEW NJSBA Insurance Exchange, an online marketplace to help you find the coverage you need.

We've made it simple to browse through options online and find individual or group benefit plans, no matter what the size of your firm or practice. Log on now to find coverage for:

- **Medical**
- **Dental**
- **Vision**

Visit the NJSBA Exchange at www.usiaffinityex.com/njsba to find affordable coverage options for you, your family and your practice.

Need guidance? Call 855-874-0267 to speak with the experts at USI Affinity, the New Jersey State Bar Association's endorsed broker and partner for 60 years.



GET MORE DONE, FASTER



*Still just searching for a list of cases?
Start with answers*

Gann Online

Try it for Free!

Cited Primary Law

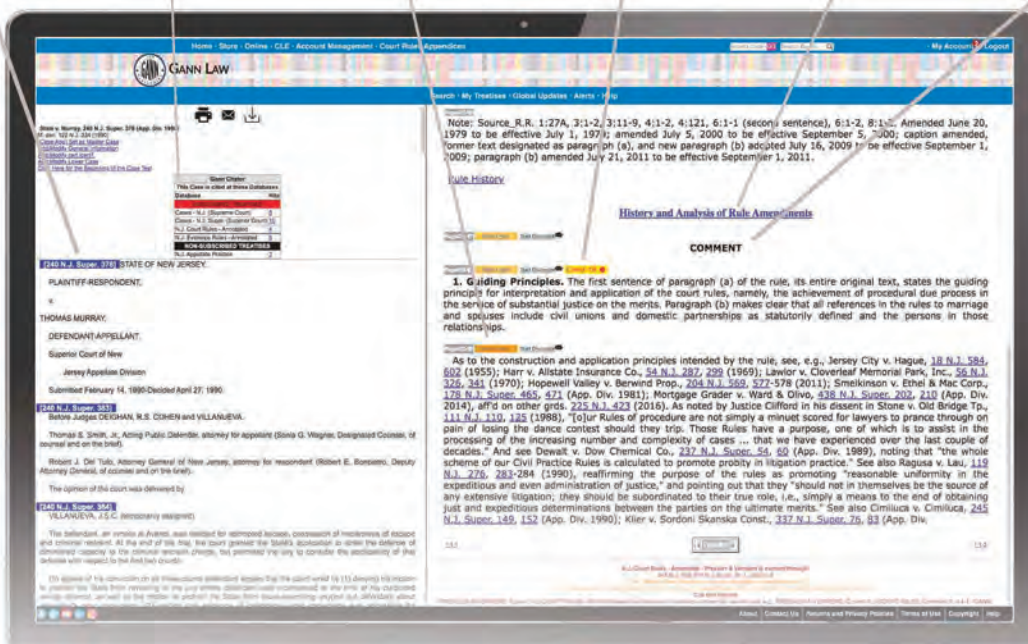
Gann Citator

What's New

Covid-19

Rule History

Gann Commentary



Full Text of Gann Treatises with Analysis of All Leading Cases

Full Text of Primary Law

N.J. & N.J. Super. • N.J. Statutes •

N.J.A.C.

Plus Weekly Alerts with Emerging Law.

Visit www.gannlaw.com/gannonline
or use the QR Code to
Register for 2 Weeks of Free Access



SCAN ME

*Does not include access to CLE webinars.
Registration for access expires 7/1/22.

www.gannlaw.com • sales@gannlaw.com • Phone (973) 268-1200
Fax (973) 268-1330 • 550 Broad Street - Suite 906 - Newark, NJ 07102

NEW JERSEY LAWYER

June 2022

No. 336



© ISTOCKPHOTO

In this Issue: **Climate Change and New Jersey's Energy Future**

Fulfilling the Promise of the Civil Rights Movement
with Environmental Justice 14

By **Thomas Prol**

New Jersey: A State of Transition—Reducing and
Responding to Climate Change in the Garden State 20

By **Shawn M. LaTourette**

How New Jersey's New Land Use Law Makes Way
for Electric Vehicles 24

By **Cosmas P. Diamantis**

C-PACE Legislation Gets a Major Upgrade,
Serving as a Catalyst for Meeting New Jersey's
Climate Change Goals 30

By **Joshua V. Berliner**

Continued



Page
20



Page
24



Page
24

Continued from page 3

Negotiating Solar Renewable Energy Agreements:
What You Should Know 34
By [Barbara J. Koonz](#)

Climate Change and Renewable Energy’s Impacts
on New Jersey’s Agricultural Industry..... 40
By [Lewis Goldshore](#)

Just Look Up: How New Jersey’s Legislature
is Responding to the Very Real Threat
of Climate Change..... 45
By [Sen. Bob Smith](#), [Joseph Gurrentz](#) and [Matthew Peterson](#)

DEPARTMENTS

President’s Perspective..... 5
Message From the Special Editors 6
Practice Tips..... 8



Page
34



Page
40



Page
45

PRESIDENT'S PERSPECTIVE

JERALYN L. LAWRENCE

Why Putting Lawyers First Matters

Editor's note: This is an excerpt of the speech NJSBA 2022-2023 President Jeralyn L. Lawrence delivered when she was installed at the Annual Meeting and Convention on May 19 at the Borgata Hotel Casino & Spa in Atlantic City.



I love being a lawyer.

I am grateful every day for my education and law degree. After my clerkship, I joined the state bar association, and it was one of the best professional decisions I have ever made. Being part of the NJSBA has allowed me to continue to grow, keep learning new skills and find new

ways to help people. Indeed, it was seeing the power of the NJSBA in action as chair of the Family Law Section in shaping alimony laws that inspired me to want to be the president of this great organization.

The ability to advocate and to bring about change is infectious. The power to identify issues within the practice, to work collaboratively with all stakeholders and to present real solutions that are then acted upon and results achieved is incredibly rewarding. I thoroughly enjoy being part of a team that works hard to address issues that affect our lives.

That is why we will spend the year ahead Putting Lawyers First.

Ours is a hard and demanding profession. We have all read the statistics about the incredible number of attorneys who are depressed and anxious and too many of us have friends and colleagues who face these very real challenges every day. We must ask ourselves: Why are 46% of lawyers depressed and 61% anxious while 63% do not get treatment? What is causing us such stress and distress?

Desmond Tutu once said: "we need to stop just pulling people out of the river. We need to go upstream and find out why they are falling in."

Our challenge this year will be to look upstream and find out why are we falling in the river. What is the cause or the root of our stress?

When I attended the Judicial Conference this past fall, Chief Justice Rabner spoke of a book where people had grown comfortable living in an old, neglected house. If there was a leak in the roof, a bucket was placed under it or if there was a creaky floor, it was just stepped over. The Chief Justice challenged the attendees to look deeper at the leaks and creaks and to be open to the possibility of change. I would ask the same when we look to areas that are making lawyers fall in the river of despair.

We know that the evolution of the business and practice of law and the ever-increasing demands from our clients will not slow down.

Ethics grievances and investigations, fee arbitrations, malpractice claims, not being paid in cases, not being relieved as counsel, dealing with negative, false and defamatory online reviews. These issues, and others, are the reasons lawyers are falling in.

That's where Putting Lawyers First comes in.

Putting Lawyers First is an intentional name. Lawyers hardly ever, if ever, put themselves first. The court comes first, the client comes first, their firm comes first, their family comes first. Never us. We need to make sure we are also looking out for ourselves. While that may be difficult for us to do as we raise our families, run our practices and lead our lives, this is exactly the kind of mission we can embrace on behalf of the profession.

I am proud to announce the formation of an ad hoc committee whose goal will be to make our life in the profession better and to provide the tools we need to survive and thrive in the ever-changing legal landscape.

There are many issues to examine:

What can we do to ensure attorneys who are knowledgeable and specialize in the area of law that is at issue are on the very same committees that are evaluating attorneys when they are facing an ethics grievance, fee dispute or malpractice claim? We need attorneys who can bring their real-life practice experience to provide meaningful assistance and guidance to resolving these disputes. We need attorneys to volunteer for

Continued on page 7

STAFF

Angela C. Scheck Publisher
Mindy Drexel Managing Editor
Janet Gallo Creative Director
Lynn Marie Gallo Advertising

EDITORIAL BOARD

Asaad K. Siddiqi Chair and What I Wish I Knew Editor
Rita Ann M. Aquilio Vice Chair
Senwan Akhtar
Lori Ann Buza
Eric C. Cohen Ethics and Professional Responsibility Editor
John C. Connell
Nancy Del Pizzo Writer's Corner Editor
Angela Foster Tech Tips Editor
Bonnie C. Frost
Darren Gelber
Philip W. Lamparello
Brian R. Lehrer A View from the Bench Editor
Dawn M. Monsen Lamparello
Susan L. Nardone Working Well Co-Editor
Mary Frances Palisano
Brian G. Paul
Michael J. Plata
Michael F. Schaff Practice Perfect Editor
William S. Singer
Lisa J. Trembly
Albertina Webb Working Well Co-Editor
Brandon L. Wolff

NJSBA EXECUTIVE COMMITTEE

Jeralyn L. Lawrence President
Timothy F. McGoughran President-Elect
William H. Mergner Jr. First Vice President
Christine A. Amalfe Second Vice President
Norberto A. Garcia Treasurer
G. Glennon Troublefield Secretary
Domenick Carmagnola Immediate Past President

New Jersey Lawyer (ISSN-0195-0983) is published six times per year. Permit number 380-680. • Subscription is included in dues to members of the New Jersey State Bar Association (\$10.50); those ineligible for NJSBA membership may subscribe at \$60 per year. There is a charge of \$2.50 per copy for providing copies of individual articles. • Published by the New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Periodicals postage paid at New Brunswick, New Jersey 08901 and at additional mailing offices. POSTMASTER: Send address changes to New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Copyright ©2022 New Jersey State Bar Association. All rights reserved. Any copying of material herein, in whole or in part, and by any means without written permission is prohibited. Requests for such permission should be sent to New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • New Jersey Lawyer invites contributions of articles or other items. Views and opinions expressed herein are not to be taken as official expressions of the New Jersey State Bar Association or the author's law firm or employer unless so stated. Publication of any articles herein does not necessarily imply endorsement in any way of the views expressed or legal advice. • Printed in U.S.A. • Official Headquarters: New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. 732-249-5000 • Advertising Display 732-565-7560.

FROM THE SPECIAL EDITORS

How Society and the Legal World are Responding to Climate Change

We are proud to present this issue of the *New Jersey Lawyer* magazine dedicated to climate change and New Jersey's energy future. The time has never been more important to explore this issue in detail.

New Jersey is at the forefront of addressing the challenges presented by climate change. On Oct. 29, 2019—the seventh anniversary of Superstorm Sandy, Gov. Phil Murphy signed Executive Order 89, which provides in part: “... New Jersey is especially vulnerable to the impacts of sea level rise, increased flooding and other aspects of climate change, with potentially disastrous consequences for public health and safety; and... minority and low-income communities are disproportionately affected by climate change, including by the health effects of higher temperatures and increased air pollution and by the displacement of coastal and low-lying neighborhoods from sea level rise and flooding...”¹ The Executive Order establishes a state Chief Resilience Officer to lead development and implementation of a Statewide Climate Change Resilience Strategy (“Strategy”). The Executive Order further establishes an Interagency Council on Climate Resilience to coordinate efforts to develop and implement the Strategy, as well as a Climate and Flood Resilience Program within the New Jersey Department of Environmental Protection (NJDEP).

The inaugural edition of the Strategy² was issued in October 2021 and outlines over 100 actions across six primary areas to help guide programs and policies that promote climate resilience. The Strategy, in conjunction with emissions reductions proposed in the state's 2020 Global Warming Response Act 80x50 Report³



DAWN MONSEN LAMPARELLO is a partner at K&L Gates LLP in the firm's Newark office. She is a member of the environmental, land and natural resources practice group. Dawn is also Co-Chair of the NJSBA's Renewable Energy, Clean Tech and Climate Change Committee and on the Board of Directors of the Environmental Law Section.



ASAAD K. SIDDIQI, the chair of the editorial board of *New Jersey Lawyer* and a member since 2011, is a Director at Trenk Isabel Siddiqi & Shahdanian, P.C., and advises clients on myriad issues, including commercial and complex litigation and non-profit law. He serves on the Civil Practice and Model Civil Jury Charges Committees of the New Jersey Supreme Court, and is a member of the board of trustees for the New Jersey State Bar Association, the Association of the Federal Bar of New Jersey and the Bergen County Bar Association.

and the 2019 Energy Master Plan,⁴ are intended to support the state in responding to climate change via a breadth of measures.

In this issue, we are very fortunate to have key insight on New Jersey's actions from state leaders. NJDEP Commissioner Shawn LaTourette authors an in-depth article regarding reducing and responding to climate change in the state. Sen. Bob Smith, Joseph Gurrentz and Matthew Peterson provide insight regarding unique climate change impacts in New Jersey and explain how the state legislature is taking action and responding to the threat of these impacts.

We also draw on the deep bench of New Jersey lawyers to weigh in on these

and other important developments. The issue opens with a critical overview of environmental justice in New Jersey and recent, significant changes (by Thomas Prol). There are also articles regarding a recent New Jersey law requiring the expansion of electric vehicle charging station infrastructure throughout the state (by Cosmas P. Diamantis); legislation establishing a statewide "Garden State" Commercial Property Assessed Clean Energy (C-PACE) Program to help provide capital for energy efficiency upgrades and renewable energy infrastructure projects across the state (by Joshua V. Berliner); recommendations and tools for negotiating solar renewable energy agreements (by Barbara J. Koonz); and an analysis regarding climate change

and renewable energy's impacts on the state's agricultural industry (by Lewis Goldshore).

We thank the contributors to this magazine for their diligent efforts and helpful insight and look forward to the strides to be accomplished in the coming years. ■

Endnotes

1. nj.gov/infobank/eo/056murphy/pdf/EO-89.pdf.
2. nj.gov/dep/climatechange/docs/nj-climate-resilience-strategy-2021.pdf.
3. nj.gov/dep/climatechange/docs/nj-gwra-80x50-report-2020.pdf.
4. nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf.

PRESIDENT'S MESSAGE

Continued from page 5

these very important committees.

Our ethics system was instituted to help protect the public, and that should be its focus. But, when ethics cases last for years, and cases are brought *sua sponte* years, or even a decade, after the alleged grievance, I suggest that we have lost our way. The NJSBA is here to help chart the course forward.

There is good and bad in every profession and ours is not immune—but we cannot allow the bad deeds of the few to impact our entire profession.

How can we allow best practices to exist in our cases, but ethics cases can go on without a reasonable end? Should there be a statute of limitations for when a grievance could be filed? Should there be a timeframe within which these cases must be completely disposed of or dismissed? Because every single second of every single day that an ethics case is pending, that ethics case is on the lawyer's mind causing strife and stress. It is a black cloud permeating their entire life.

How can we help attorneys who find themselves never being able to turn off work because technology has made it so easy to communicate such that everyone expects instant replies? We have become a profession of instant messaging. The pace of this practice is not sustainable, and we need to find ways to create healthy boundaries. This is part of the reason why I love virtual proceedings. Not only have they provided significant, meaningful access to the court for our clients, but they are also extremely efficient and can ease a lot of the stress we face in trying to be many places at the same time, as well as allowing us to manage our inboxes and our office instead of our precious time being spent on unnecessary waiting and travel.

How can we help attorneys thrive in the evolving virtual marketplace where clients can leave false online reviews that have a significant impact on our reputations, or a competitor can purchase our name to intentionally re-direct potential clients to their own website?

We need to review the law surrounding how lawyers can be more easily relieved as counsel when they ask to do so as well as ways we can ensure lawyers are paid for services they have been contracted to provide and have provided.

We know there is more to be done.

We need to be open to real, meaningful change. We are always under enormous pressure and always will be, but it will help for the profession to take our needs seriously and find ways to make this practice better.

When the NJSBA mobilizes and puts its weight behind a challenge, it can be an impressive force. There is much work to do. And it is my privilege and pleasure to do it. And I am proud to do this work, alongside all of you.

On behalf of the entire Executive Committee and Board of Trustees and leadership staff, we thank you for coming and for your friendship and support. We promise to work hard, make you proud and be champions for Putting Lawyers First.

Thank you. ■

PRACTICE TIPS



PRACTICE PERFECT

8 Things Killing Your Law Firm

By PracticeHQ

Defects

In legal practice, think of defects as mistakes made: the wrong party listed on a contract or the style of a case; notices not sent or sent to the wrong people; missed deadlines; drafting and re-drafting documents time after time—not to build upon the legal argument—but to fix errors.

These are all mistakes. They are also waste—the client does not want them, and they add no value.

Other examples of Defect waste in a legal organization:

- Reprinting a letter because of an incorrect address or other typo
- Data entry errors
- Correcting time entries on billing statements
- Losing files or documents
- Creating contracts, memos, and briefs requiring extensive corrections

Overproduction

Overproduction occurs when the firm does work (produces something) before demand exists. Some real-life legal examples of overproduction:

- Doing more research than required
- Emailing or faxing the same document multiple times
- CC'ing people on emails that have not requested to be CC'd or that don't need to be in the loop
- Producing unnecessary documents or too many documents
- Making too many copies of a document

In each example, the firm expended resources to produce work for which there is no client demand and which the client does not value. Overproduction increases operating costs that you cannot recover since clients are unlikely to pay for something that fails to benefit them.

Waiting

Look around your firm. How many people at a given time are waiting for something?

- Staff (or attorneys) waiting at a copier or scanner
- Waiting for the review of a document
- Delays in completing delegated tasks
- Waiting for clients to provide documents
- Not responding to emails timely
- Delays caused by outdated technology

Waiting negatively impacts productivity whether the firm bills hourly, works contingency, or offers value pricing.

Non-utilized talent

This waste manifests itself as failure to use developed skills or aptitude to provide value to clients. Examples include:

- Not seeking input on an improvement from all firm members capable of providing quality feedback
- Paralegals or highly skilled workers performing mere clerical tasks
- Attorneys doing clerical work. While one must balance self-sufficiency against talent utilization, an attorney copying documents or addressing envelopes is not performing high-level, valuable, billable tasks for clients.
- Placing an untrained individual with inadequate skills is a recipe for failure. Training creates utilizable talent. Do not force staff to waste time “figuring things out.” Placing some-

one in that position is unfair to them, a liability to the organization and its clients, and ultimately a waste of time, money, and human resources all around.

- Failing to acknowledge individuals' contributions to the organization. Encourage staff to voice opinions and search for ways to improve firm processes. Value those opinions. People offering improvements and suggestions care about the outcome. That care is critical to creating a "continuous improvement" culture.

Transportation

How much "churn" of information and materials happens in the organization? Do you shuffle matters and work-in-progress (WIP) from person to person? Often, poor understanding of a process causes transportation waste.

Examples include:

- Needing to walk to a central scanner or copier
- Moving data from one system to another or keeping multiple forms of the same data
- Updating client records in multiple systems

Inventory

Although inventory waste sounds like it only applies to manufacturing industry, it is also well-suited to professional services. It is a fancy term for "unnecessary clutter," both physical and digital. Examples include:

- Too much WIP; taking too long to move cases along when you are able to; and keeping too many files on your desk as a result.
- Not closing out files at matter completion
- Keeping too many copies of documents
- Having hundreds or thousands of emails in your inbox
- Keeping outdated computers

No matter the type of inventory waste, the result is the same. The result is wasted time, wasted resources, and increased overhead.

Motion

Motion waste describes the movement of people or information that doesn't add value to the process. This waste can be caused by poor office design or the lack of systems for organizing files and information. Motion waste makes people look busy. Don't confuse busyness with valued added! Motion waste examples include:

- Looking for physical files throughout the office
- Searching for files in a file cabinet
- Searching for information on a computer network
- Poorly designed offices

Extra Processing

Extra processing is work performed beyond what your client requires or considers valuable. Examples of extra processing include:

- Purchasing expensive folders or supplies if not valued by your client when a cost-effective alternative suffices
- Creating duplicative documentation or data in different systems
- Doing work that beyond the scope of the client's case or matter

The result is wasted resources that the client won't cover because he does not value your added exertions or expenditures. The extra processing increased operational costs for zero client benefit, consequently decreasing profitability.



TECHNOLOGY

How to tame information overload

In a world where work life is constantly bombarded with distractions—email, social media, smartphones—those who can't tune out the digital noise often struggle with productivity.

Paul Unger, a partner at Affinity Consulting, offers advice on how to manage daily time and tasks, improve client communication and achieve professional goals.

Here are the salient tips that can help attorneys run their practices more efficiently.

Do a Self-Assessment

Start by calculating your total interruptions during the day. Tally up every time you are distracted—with emails, instant messages, phones calls, internet breaks—and divide that number by 480, the minutes you work over an eight-hour day. Studies show that the average professional is interrupted every two or three minutes during the workday, and it can take up to 20 minutes to return to the original task, according to Unger.

The Cost of Multitasking

Human brains are not well equipped to multitask, Unger said. Doing so takes more time, leads to mistakes and causes more stress, especially for workers who use two computer screens.

“No one would expect you to write an appellate brief on screen one, and then on screen two you’re drafting a contract,” Unger said. “That’s completely unreasonable.”

Instead, give yourself and your coworkers a block of time to focus on one task, distraction-free, Unger said.

New research has claimed that workers who constantly juggle tasks, and are oft-distracted by email and phone calls, suffer a fall in IQ more than twice than found in marijuana smokers, according to Unger.

“We can’t eliminate our workload, but we can dial down the noise and we can take down the task switching,” he said.

Digital Detox

The advent of technology in the workplace has hurt productivity almost as much as it has helped, according to Unger. Social media has addictive properties, which can lead to mental health issues and harm your ability to focus. Unger recommended that workers practice “digital minimalism.” Start with a 30-day social media fast, or limit your social media time to 15 minutes a day, refrain from social sites between 9 a.m. and 5 p.m, and turn off your device after 9 p.m.

“You might realize ‘I don’t need Facebook or Instagram, but I need LinkedIn for business networking,’” Unger said. “It’s a very effective way to put limits on the amount of time you’re on social media.”

The Email Black Hole

About 85% of workers start the morning by logging into email and letting the barrage of incoming messages dictate the day, according to Unger.

“Don’t fall into the email black hole,” he said. “Email is not your daily plan.”

It’s more constructive to develop your own written planner to serve as a daily roadmap, Unger said. Write down your priorities

for the day, grateful thoughts and a couple reminder notes.

Try not to leave email open on your computer screen all day, Unger said. You don’t have to shut it down, but minimize it and turn off notifications so you can devote most of the day to tasks on the planner.

Don’t get discouraged if you fail to accomplish everything on the daily plan, Unger said. Most professionals rarely do.

“Plans never go as planned in the legal world. However, if you get 50% to 80% of your plan done for that day, that is a total win,” he said.

Do a Weekly Deep Dive

Attorney calendars are loaded with appointments and deadlines. To help get ahead of schedule, Unger recommended that attorneys look two weeks ahead in their calendars, read every item and ask, “what do I need to do to prepare for this?” Then go two weeks back and see if you missed anything.

“You’re looking for things that you promised people that you didn’t do,” Unger said. “Oftentimes that happens because you go from one meeting to the next with no buffer time.”



WORKING WELL

Are You a Mindful Attorney?

By Lori Ann Buza

KS Branigan Law

NJSBA Lawyer Well-Being Committee Co-Chair

Mindfulness is directing attention to the present without judgment or preconception, not focusing on what has happened in the past nor worrying about what will happen in the future but

feeling appreciation and gratitude for the present. Mindfulness helps one with self-awareness, self-regulation, and self-appreciation, as it fosters a richer understanding and insight into oneself and others. Moreover, it teaches the tools to balance work with personal life and find peace, joy, and success in both. Regularly practicing meditation and real time self-reflection are tools to help one master mindfulness.

Why? Integrating mindfulness practice into an attorney's life enhances their abilities to act ethically and professionally while providing the attorney with broader insight into their clients' needs and the best methods to represent them. Mindful attorneys have greater capacity to see what is beneath the surface of their clients' factual and legal issues. They are less inclined to have bias based upon preconceived notions and more inclined to have openness and acceptance of differences in others. Thus, it helps attorneys to cross class, education, gender, and cultural barriers with their clients as well as face the challenges of their communities at large.

Using mindfulness principles, attorneys can learn to master and control their own thoughts, which in turn helps them control their behavior. It teaches one to take time to reflect, be silent, pause before responding, and control the situation or case presented. Instead of mindlessly reacting, mindfulness gives one the opportunity to offer their best response to a situation, including both the best choice of words and actions. Attorneys may learn to listen better and feel empathy for their clients, have humility, and better counsel their clients. In return, clients may develop a deeper trust and higher satisfaction rating for their attorney.

Mindfulness may cultivate an attorney's growth in many areas, such as concentration, focus, accountability, decision-making, mental clarity, effectiveness, and problem-solving abilities. As a result, mindfulness may help lawyers to have stronger/repeat relationships with clients, more productive relationships with adversaries, judges, and support staff, and overall to more effectively "lawyer." ■



THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

America's Premier Civil-Trial Mediators & Arbitrators Online

NADN is proud to partner with the National Defense and Trial Bar Associations



driTM

The Voice of the **Defense** Bar



AMERICAN
ASSOCIATION FOR
JUSTICE[®]

The Association for Trial Lawyers

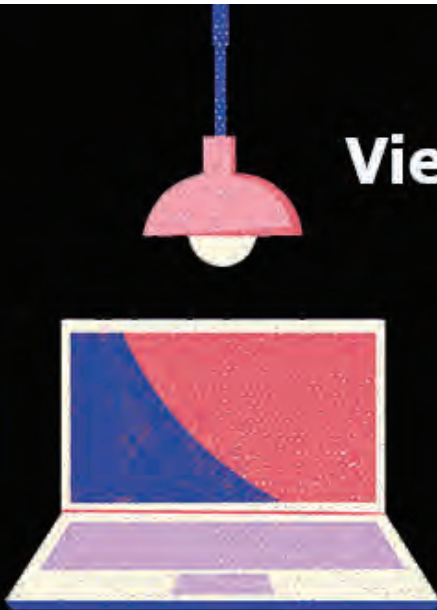
2022 Trial Advertiser

View Bios & Availability Calendars for the top-rated neutrals in each state, as approved by local litigators

www.NADN.org

The National Academy of Distinguished Neutrals is an invitation-only professional association of over 1000 litigator-rated mediators & arbitrators throughout the USA, including over 30 members of our New Jersey Chapter. For local ADR professionals, please visit www.NJMediators.org

Our Best Programs. Viewable Wherever You Are.



Choose from
CLE On-Demand Videos
in every area of law.

- Featuring top experts.
- Earn CLE from any location.
- No complicated technology.

Order, Watch, and Earn Credits Immediately

Order and watch our on-demand video programs - 24/7 - from the convenience of your home or office! Anywhere your laptop, desktop, iPod, iPad, tablet or smartphone goes, you can be earning the credits you need.

Once you purchase your CLE On-Demand products, you'll receive an email with an access link and instructions to get started.
Note: You have 120 days from the date of purchase to view the program.

Here's how our On-Demand Video Seminars work:

- Select and purchase the program you would like to view
- View the program at your convenience (you have 120 days from the date of purchase)
- Your credits will be tracked automatically.

**Need CLE credits
fast? We've got
it covered.**

Earn 12 of your 24 New Jersey MCLE credits where and when it works for you: at home, on your commute, at the park, at the gym... anywhere your iPad, tablet or smartphone goes. You choose the method that works best for you.

CLE On-Demand programs are available in these areas of law:

- | | | |
|--------------------------------------|--------------------------------|----------------------------|
| - Animal Law | - Election Law | - Land Use Law |
| - Banking Law | - Environmental Law | - Law Office Management |
| - Bankruptcy Law | - Estate Law | - Local Government Law |
| - Business and Commercial Litigation | - Ethics | - Municipal Court Practice |
| - Business Law | - Family Law | - Patent and Trademark Law |
| - Civil Trial Law | - Federal Practice & Procedure | - Real Estate |
| - Construction Law | - General Law | - Renewable Energy |
| - Criminal Law | - Health Law | - School Law |
| - Dispute Resolution | - Immigration Law | - Taxation Law |
| - Diversity | - Insurance Law | - Workers Compensation |
| - Elder and Disability Law | - Labor and Employment Law | |

For a complete listing of programs, visit NJICLE.com

Available Now. Viewable Anywhere, Anytime from Any Device.

Visit NJICLE.com to place your order today.

**Voted New Jersey's
Top CLE Provider.**

NJICLE Summer Institutes

2022 Trial Advocacy Summer Institute

Thurs., July 14 and Fri., July 15

8:45 a.m. to 4 p.m.

NJ Law Center, New Brunswick

Presented in cooperation with the American College of Trial Lawyers

This 2-day intensive Institute will combine a series of lectures and demonstrations designed to sharpen your skills in NINE key aspects of civil and criminal trial practice – Rule 104 hearings, Jury Selection and trial themes, Opening Statements, Direct Examination and Cross-Examination of Lay Witnesses, Direct and Cross Examination of Expert Witnesses, Trial Ethics, Criminal Trial Issues, Utilizing Video Deposition and Demonstrative Exhibits at Trial, and Summation. Plus, a special luncheon presentation each day! Attending the program presents a unique opportunity to benefit from the courtroom experience of some of New Jersey's top trial lawyers. What you learn in just two days can give you the competitive advantage in your next case.

2022 Labor and Employment Summer Institute

Tues., July 19 and Wed., July 20

9 a.m. to 3 p.m.

NJ Law Center, New Brunswick

Presented in cooperation with NJSBA Labor & Employment Law Section

This 2-day Institute provides a comprehensive overview of labor and employment law. Newly admitted and seasoned attorneys seeking to expand their practices will benefit from attending, as well as corporate, commercial, civil rights, insurance, and workers' compensation lawyers and general practitioners. The conference provides a comprehensive overview of substantive labor and employment law and features practical insights and perspectives on handling labor and employment matters. You will learn about the critical areas of L&E practice and will learn from the state's leading employment and labor law practitioners about the key strategies you need to use to get the best results for the clients you represent. It is truly an opportunity to learn from the masters. You'll come away with a deeper understanding of the law, plus gain practical tips and effective techniques you can use right away in your practice.

2022 Family Law Summer Institute

Tues., July 26 and Wed., July 27

9:00AM to 4:30PM

NJ Law Center, New Brunswick

Presented in cooperation with the NJSBA Family Law Section

The Family Law Summer Institute is a two-day, information-packed program that provides keen insights into almost all aspects of matrimonial practice. Every family lawyer will benefit from attending. Attorneys starting their legal careers will learn from a large and authoritative panel of matrimonial attorneys and judges discussing how to conduct client interviews, deal with adversaries, and negotiate, settle, and try cases. Experienced attorneys benefit from hearing fresh insights and nuanced perspectives about handling complicated and ethically challenging problems that arise in family practice.

Visit [NJICLE.com](https://www.njicle.com) to register today.



Fulfilling the Promise of the Civil Rights Movement with Environmental Justice

By Thomas Prol



THOMAS PROL is a former president of the New Jersey State Bar Association and an environmental lawyer with Sills Cummis & Gross P.C. in Newark. He resides in Asbury Park.

New Jersey Gov. Phil Murphy's April 20, 2018, Executive Order (EO) 23 set in motion one of the most far-reaching undertakings in his ambitious environmental agenda for the Garden State: implementing "Environmental Justice." In EO 23, Murphy stated that he was "strongly committed to leading an administration that ensures all New Jersey residents...are able to live and work in a healthy and clean environment, and have equal access to clean energy resources and other public programs..."¹

Harking back to President Bill Clinton's Feb. 11, 1994, Executive Order 12898 entitled, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations,"² Murphy's EO 23 gave pointed instruction to the New Jersey Department of Environmental Protection (NJDEP or Department) to undertake specific tasks and "take the lead in developing guidance for all [New Jersey] Executive branch departments and agencies for the consideration of Environmental Justice in implementing their statutory and regulatory responsibilities."³ The gubernatorial directive mandated the insertion of "the issue of Environmental Justice [to] make evaluations and assessments in accordance with [NJDEP] guidance, in all Executive Branch actions."⁴

The Evolution of Environmental Justice

The interconnection of environmental degradation and poverty is not a new concept, having developed centuries ago in the industrialization era and eventually becoming so prominent in popular culture that it was the theme of the 1941 Best Picture Oscar® winner, "How Green Was My Valley."⁵ (The movie even bested "Citizen Kane" that year.) The linkage became more pronounced during the Civil Rights Movement of the 1950-60s, where activists embraced it as one of many social justice undercurrents and themes, including in Martin Luther King's 1967 "Poor People's Campaign."⁶

NJDEP has catalogued a "Timeline of Key Environmental Justice Milestones" on its website, including noting the first reported use of the term "Environmental Justice" in 1991 when the "First National People of Color Environmental Leadership Summit" convened and adopted, "The Principles of Environmental Justice."⁷ That report unified the environmental justice movement and catalyzed a plan to achieve governmental action on it.

In 1994, the United States Environmental Protection Agency (USEPA) launched the Environmental Justice Small Grants (EJSG) Program which, to date, "has awarded more than \$37 million in funding [up to \$100,000 per grant] to over 1500 community-based organizations, tribal governments, and Native American organizations working with communities facing environmental justice issues."⁸ The EJSG Program supports and empowers communities working on solutions to local environmental and public health issue.⁹

Thereafter, subsequent administrations of Governors Jim McGreevey and Jon Corzine engaged executive action while NJDEP Commissioner Bob Martin proposed administrative actions on the issue in 2004, 2009 and 2016, respectively.¹⁰ No corollary legislative action followed, however. It was not until 2017 that Sen. Cory Booker introduced the first federal Environmental Justice bill.¹¹

Defining Environmental Justice

While the definition of Environmental Justice has evolved over the past several decades, even being referred to as "environmental racism" by some activists, its underlying premise has remained constant: imposing social justice in environmental policy, permitting and decision-making. The USEPA defines

Environmental Justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."¹²

By "fair treatment," USEPA and NJDEP state that, "no group of people, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies."¹³ Those agencies define "meaningful involvement" as where "people have an opportunity to participate in decisions about activities that may affect their environment and/or health; the public's contribution can influence the regulatory agency's decision; community concerns will be considered in the decision-making process; and decision makers will seek out and facilitate the involvement of those potentially affected."¹⁴

According to NJDEP findings, New Jersey's low-income communities and communities of color have historically "been subject to a disproportionately high number of environmental and public health stressors, including pollution from numerous industrial, commercial,

Governor Murphy's Executive Orders Related to Environmental Justice

Executive Order 23: Addresses environmental justice issues in New Jersey's urban communities, Jan. 20, 2018

Executive Order 89: Establishes statewide climate change resilience strategy, Oct. 29, 2019

Executive Order 100 (PACT): Murphy unveils Energy Master Plan and signs executive order directing sweeping regulatory reform to reduce emissions and adapt to climate change, Jan. 27, 2020

Executive Order 221: Establishes the Office of Climate Action and the Green Economy, Feb. 16, 2021

and governmental facilities located in those communities and, as a result, suffer from increased adverse health effects including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental disorders.”¹⁵

The term “Environmental Justice” has two distinct facets: a social justice movement and an interdisciplinary body of social science. The more common usage, that of a social movement, focuses on the equitable distribution of environmental benefits and burdens. The other use refers to an interdisciplinary body of literature and study that includes theories of the environment and justice; environmental laws, policies and policies and their planning and implementations; governance for development and sustainability; and political ecology.¹⁶

New Jersey As a National Leader in Environmental Justice

Even the global COVID-19 pandemic, simultaneous Public Health Emergency and State of Emergency declarations and statewide shutdown orders did not slow the momentum of Murphy’s Environmental Justice effort. On Sept. 18, 2020, Murphy signed the New Jersey Environmental Justice Law, N.J.S.A. 13:1D-157, *et seq.* (EJ Law). It became effective immediately.¹⁷

Prior to its passage, with the help of Assemblyman John McKeon, Murphy and then-NJDEP Commissioner Catherine

McCabe penned a joint July 17, 2020 op-ed in *The Star-Ledger*, decrying the “40-plus years of [shortcomings in] implementing our environmental laws” and demanding that “New Jersey must seize this opportunity to deliver on the promise of environmental justice for all.”¹⁸

The EJ Law codified in statute the governor’s ambitious environmental agenda as it sought to right the wrongs of New Jersey’s legacy of environmental problems. It imposed social justice in environmental permitting, policies, and regulatory decision-making. As discussed *infra*, among other concerns, it required NJDEP and permit applicants to consider the history of the burden unfairly borne by disenfranchised people and to evaluate environmental and public health stressors of certain facilities on overburdened communities.

The EJ Law recited several legislative and public policy findings at N.J.S.A. 13:1D-157, specifically targeting the “impact of pollution on overburdened communities” and seeking to “correct this historical injustice” of a disproportionate share of environmental burden being foisted in low-income and minority communities. As stated in the law’s preamble, the Legislature declared that all New Jersey residents “have a right to live, work, and recreate in a clean and healthy environment.”¹⁹ It continued, “historically, New Jersey’s low-income communities and communities of color have been subject to a disproportionately

high number of environmental and public health stressors, including pollution from numerous industrial, commercial, and governmental facilities located in those communities.”²⁰

Addressing health impacts specifically, the EJ Law seeks to undo the sins of the Garden State’s environmental past where “the State’s overburdened communities have suffered from increased adverse health effects...[and] children are especially vulnerable to the adverse health effects caused by exposure to pollution, and that such health effects may severely limit a child’s potential for future success” and “the adverse effects caused by pollution impede the growth, stability, and long-term well-being of individuals and families” in those communities.²¹

Calling out “the legacy of siting sources of pollution in overburdened communities,” the statute decries the impact the inequality of such siting has on poor communities, saying it “continues to pose a threat to the health, well-being, and economic success of the State’s most vulnerable residents; and that it is past time for the State to correct this historical injustice.”²² Accordingly, the Legislature mandated that “no community should bear a disproportionate share of the adverse environmental and public health consequences that accompany the State’s economic growth,” requiring that those “overburdened communities must have a meaningful opportunity to participate in” facility siting

NJDEP Important Publications

NJ Climate Science Report
bit.ly/NJCScience

Global Warming Response Act 80x50 Report
bit.ly/NJ80x50

NJ Climate Change Resilience Strategy
bit.ly/NJCCRS1

NJ RGGI Strategic Funding Plan
bit.ly/njRGGIplan

NJ Energy Master Plan (2019)
nj.gov/emp

where there is a “potential to increase environmental and public health stressors,” thereby empowering communities to “limit the future placement and expansion of such facilities.”²³

The statute, at *N.J.S.A.* 13:1D-158, laid out eight definitions pertinent to the EJ Law’s requirements. Key among these are “environmental or public health stressors,” defined to broadly include concentrated areas of air pollution and conditions that may cause potential public health impacts, and “overburdened community” which is a Census block that contains at least 35% low-income households, 40% minority residents, or 40% limited English proficiency households.²⁴

Portending significant disruption under New Jersey’s environmental rule-making and permit issuance schemes, the statute required that NJDEP “publish and maintain on its Internet website a list of overburdened communities in the State” within 120 days of the EJ Law’s Sept. 18, 2020 effective date.²⁵ Further, the Department is required to “update the list of overburdened communities at least once every two years...[and] notify a municipality if any part of the municipality has been designated an overburdened community.”²⁶

NJDEP’s Aggressive Roll-out of EJ Under Commissioner LaTourette

On Jan. 19, 2021, three days after Shawn LaTourette was named Acting NJDEP Commissioner by Murphy, the Department published the statutorily required overburdened communities (OBC) list. It includes an EJ OBC mapping tool to identify whether a given facility or activity is in a block group identified as an OBC.²⁷ The full Overburdened Community site and related tools are found at nj.gov/dep/ej/communities.html.²⁸

Almost immediately following his formal June 14, 2021, appointment as NJDEP Commissioner, LaTourette seized on Murphy’s Environmental Justice mandate, issuing Administrative Order

(AO) 2021-25. The AO was intended “to provide guidance and certainty regarding the Department’s expectations for facilities located or seeking to be located in overburdened communities prior to adoption of implementation rules.” Moreover, NJDEP wanted to “ensure meaningful community engagement, a more thorough and complete assessment of facility impacts to environmental and public health stressors, and the implementation of appropriate measures to avoid or minimize adverse impacts.”²⁹

Commissioner LaTourette’s AO 2021-25 established six operative conditions for facilities seeking permits in overburdened communities (as each are defined under the EJ Law).³⁰ To the extent consistent with applicable law:

1. Public comment periods are to be no less than 60 days, extended from a standard 30 days, and shall be extended to 90 days upon request by a member of the overburdened community.
2. Public hearings will be mandatory and conducted in a manner consistent with the EJ Law to maximize public participation. This requires in-person hearings to be in the overburdened community unless appropriate alternative arrangements are necessary due to COVID restrictions.
3. During the extended public comment period, the Department encourages interested parties providing comment to provide information regarding existing conditions within the overburdened community and potential facility-wide environmental and public health stressors that could result in adverse impacts upon the overburdened community in the event of an approval.
4. Applicants are expected to respond to and address the concerns raised by individuals in the overburdened community during the public comment process and to conduct any additional analysis related thereto that the

Department deems necessary for its review.

5. The Department strongly encourages each applicant to engage directly with individuals in the overburdened community in advance of and in addition to formal public comment including providing relevant information related to facility-wide impacts.
6. Where permits or approvals may be issued, the Department will apply such special conditions as may be necessary to avoid or minimize environmental or public health stressors upon the overburdened community to the maximum extent allowable by law.

Conclusion

Environmental Justice incubated and developed in the crucible of the civil and human rights battles waged over centuries. It evolved quickly and significantly during the racial and ethnic rights activism in the 1960s to become the powerful statutory and regulatory tool for environmental concerns that we know and use. Under Murphy and LaTourette, New Jersey has developed quantifiable metrics and detailed requirements to end the unfair and discriminatory practices that disproportionately imposed environmental burdens on poor and minority communities. ■

Endnotes

1. nj.gov/infobank/eo/056murphy/pdf/EO-23.pdf
2. 59 FR 7629. Clinton’s 1994 EO 12898 directed federal agencies: “(1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify

differential patterns of consumption of natural resources among minority populations and low-income populations.” In addition, EO 12898 crafted an environmental justice strategy framework with “a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.”

3. See EO 23, [nj.gov/infobank/eo/056murphy/pdf/EO-23.pdf](https://www.nj.gov/infobank/eo/056murphy/pdf/EO-23.pdf)
4. *Id.*
5. See [imdb.com/title/tt0033729/](https://www.imdb.com/title/tt0033729/)
6. See, e.g., Martin, Emily, “How Martin Luther King, Jr.’s multifaceted view on human rights still inspires today,” *National Geographic Magazine*, Jan. 14, 2022 (stating, “King’s work continues to influence and inspire activism—particularly in the realm of environmental justice, as studies indicate that climate change disproportionately harms marginalized communities.”) at nationalgeographic.com/history/article/how-mlks-multifaceted-view-on-human-rights-still-inspires
7. [nj.gov/dep/ej/docs/furthering-the-promise.pdf](https://www.nj.gov/dep/ej/docs/furthering-the-promise.pdf)
8. [epa.gov/environmentaljustice/environmental-justice-small-grants-program](https://www.epa.gov/environmentaljustice/environmental-justice-small-grants-program)
9. *Id.*
10. See <https://www.nj.gov/dep/ej/docs/furthering-the-promise.pdf>
11. *Id.*
12. See [epa.gov/environmentaljustice](https://www.epa.gov/environmentaljustice) and <https://www.nj.gov/dep/ej/>
13. *Id.*
14. *Id.*
15. See [nj.gov/dep/ej/](https://www.nj.gov/dep/ej/)
16. See, e.g., Scheidel, A. *et. al.*, “Ecological distribution conflicts as forces for sustainability: an overview and conceptual framework.” *Springer Sustainability Science*, Oct 2017. [ncbi.nlm.nih.gov/pmc/articles/PMC6086280/](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6086280/)
17. P.L. 2020, c. 92, § 1, effective September 18, 2020.
18. See [nj.com/opinion/2020/07/gov-murphy-dep-its-time-to-make-good-on-our-promise-of-environmental-justice-opinion.html](https://www.nj.com/opinion/2020/07/gov-murphy-dep-its-time-to-make-good-on-our-promise-of-environmental-justice-opinion.html)
19. *N.J.S.A. 13:1D-157*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *N.J.S.A. 13:1D-158*
25. *N.J.S.A. 13:1D-159*
26. *Id.*
27. [nj.gov/dep/ej/docs/njdep-ao-2021-25-environmental-justice.pdf](https://www.nj.gov/dep/ej/docs/njdep-ao-2021-25-environmental-justice.pdf); see also, [nj.gov/dep/commissioner/](https://www.nj.gov/dep/commissioner/)
28. Last visited May 8, 2022.
29. [nj.gov/dep/ej/docs/njdep-ao-2021-25-faqs.pdf](https://www.nj.gov/dep/ej/docs/njdep-ao-2021-25-faqs.pdf)
30. [nj.gov/dep/ej/docs/njdep-ao-2021-25-environmental-justice.pdf](https://www.nj.gov/dep/ej/docs/njdep-ao-2021-25-environmental-justice.pdf)



withum[⚖]
ADVISORY TAX AUDIT



demand integrity[⚖]

character matters in the courtroom as justice is never blind to seeking truth. Withum and our team of top forensic and valuation professionals know what it takes to build a winning case. Attorneys of defendants and plaintiffs alike value our unwavering integrity and success record of trying and settling hundreds of cases.

Visit us online to learn more about our Forensic and Valuation Services.

withum.com



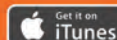
REACH *Beyond*

Power your law practice with industry-leading legal research. Fastcase is a free member benefit of the New Jersey State Bar Association.

 **fastcase**[®]

LEARN MORE AT WWW.TCMS.NJSBA.COM

DOWNLOAD TODAY





New Jersey: A State of Transition

Reducing and responding to climate change in the Garden State

By Shawn M. LaTourette



*Appointed by Gov. Phil Murphy to be a member of his Cabinet, **SHAWN M. LATOURETTE** is New Jersey's 18th Commissioner of Environmental Protection and is responsible formulating statewide environmental policy and leading NJDEP's 3,000+ environmental professionals in protecting New Jersey's air, land, water, and natural and historic resources.*

New Jersey's climate is changing, its landscape and economy along for the ride. Some aspects are loud, sudden, painful—like the loss of entire neighborhoods within a few hours of down-pour. Others are quieter, more incremental, and hopeful—like the anchoring of the U.S. offshore wind industry right here in New Jersey, empowering a new generation of students and workers who will power our economy with the renewable energy we need to avert the worst climate changes.

The question is no longer *if or when* climate change will affect us, but about the scale and pace of our collective response. How will our businesses become carbon neutral, our homes energy efficient, our cars zero-emission, and our communities more resilient to incrementally rising tides and suddenly roaring rivers?

How? One planful, affirmative step after another—as quickly and boldly as we can.

New Jersey is grounding its climate policy in science, investing in clean energy and climate resilience, and supporting our transition with regulatory reforms that will modernize our bureaucracy and enable our state to meet this critical moment.



PHOTO COURTESY OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Supporting and Sharing the Science

We start with the facts: human-caused climate change, primarily due to our reliance on fossil fuels, has dangerously warmed our planet and the Garden State is already experiencing its adverse effects. Temperatures in New Jersey are increasing, sea levels are rising, and extreme weather is becoming more frequent and intense. Periods between rain events are likely to grow longer, causing more frequent drought conditions, reducing both water supply availability and agricultural capacity. Hot, dry periods are likely to lengthen and intensify the state's already significant wildfire season. At the same time, "sunny day flooding" will occur more often across New Jersey's entire coastal area, with such non-storm flooding likely present year-round in communities like Atlantic City.¹

Between 1999 and 2022, intense precipitation has increased by 2.5% to 10% across New Jersey and is projected to increase by more than 20% to 50% in the coming decades.² Rainfall increases vary geographically and are greater in the northwestern and central parts of the state than in the south. Along the coast, however, sea level is rising at a greater rate in New Jersey than most other parts of the world and could increase by as much as 2.1 feet by 2030 and by as much as 5.1 feet by 2100.³

As the remnants of Tropical Storm Ida

made painfully clear in September 2021, the impacts of climate change are already manifesting across the state. This presents new and increasing risks to public and private assets, the assessment of which is not yet widely integrated into the development, financing, and insurance decisions that shape our communities. Both market and regulatory forces are beginning to prompt such assessments, which are anticipated to have beneficial effects for the state's long-term economic vitality.

Reducing Emissions

To avoid the most devastating impacts of climate change, the Garden State, like much of the world, must transition off fossil fuels. To chart this transition, the Department of Environmental Protection (DEP) prepared the Global Warming Response Act 80x50 Report (2020),⁴ a detailed strategy spanning seven distinct economic and emissions sectors that, if pursued forcefully and concertedly, would reduce statewide emissions by 80% below 2006 levels by 2050. The ambitious strategy requires deliberate and coordinated action by all levels of government and institutions across the public and private spheres. The highest-impact strategies involve aggressive emissions reductions from the transportation, buildings, and electric-generating sectors.

Through a series of executive orders, Gov. Phil Murphy has established an aggressive climate action policy that partners strong incentives for renewable energy generation and transportation electrification with supportive regulatory reforms. The goal is to reduce emissions economy-wide while building a stronger and fairer green economy fueled by renewable energy.⁵

To support this transition, the DEP has proposed the first phase of its Climate Pollutant Reduction (CPR) regulatory reforms, one component of the larger New Jersey Protecting Against Climate Threats (NJPACT) initiative directed by Executive Order 100. CPR includes a proposed new Greenhouse Gas Monitoring and Reporting Rule,⁶ which will better quantify emissions of climate pollutants to support future reduction reforms, an adopted Advanced Clean Trucks and Fleet Reporting Rule,⁷ which will reduce the emissions of climate pollutants by increasing the percentage of electric vehicles sold in New Jersey through the institution of manufacturer sales requirements, and a proposed Control and Prohibition of Carbon Dioxide Emissions Rule,⁸ which will reduce emissions from fossil fuel-powered electric generating plants over the next decade, consistent with the State's Energy Master Plan.

While these new rules will not by themselves reduce emissions enough to meet the state's 80x50 climate goal, each rule represents a necessary affirmative step in the direction of carbon neutrality. DEP will build upon this progress in phase two of CPR, the development of which will launch by mid-year.

Building Resilience

As we further commit to aggressive emissions reductions, we must also acknowledge and respond to the climate changes we simply cannot avoid, including the intensifying storms and flooding that many New Jersey communities experienced in the wake of Ida.

Today, we are experiencing climate changes wrought by past emissions, and we should all expect these impacts to continue and even worsen in the years ahead. The imperative to rapidly reduce emissions today is *not* so that may avoid climate damage tomorrow, but to avoid the worst-case climate damages decades from now. In short, with choices we make today, we must consider the difference between 5.1 feet of sea level rise by 2100 (the moderate emissions scenario) and 8.8 feet of sea level rise by 2100 (the high-end, worst-case emissions scenario).

Although the prospect of climate change can be frightening in the abstract, our ability to project climate impacts and plan to mitigate them is empowering. Together, we have the power to protect our communities and

secure our economy.

DEP is steadfast in its support for communities, businesses, and residents seeking to build resilience and adapt to the realities of a changing climate. In 2021, DEP released the Statewide Climate Resilience Strategy,⁹ an iterative planning tool that will be continually updated in the years ahead, and which presents more than 100 actions that can guide institutions across New Jersey in becoming more resilient. Because every community will experience climate change differently, building resilience starts with individualized assessment and planning, and DEP is providing critical support. Developers and local governments can rely on the newly released Resilient NJ Local Planning for Climate Change Toolkit¹⁰ intended to guide local assessments of climate vulnerabilities that will support sustainable land use planning.

Localities can similarly benefit from DEP's Stormwater Utility Guidance,¹¹ which provides critical tools to help mitigate flooding, improve water quality and build long-term community resilience. And, through the newly announced expansion of DEP's Blue Acres program, residents and communities can apply for DEP assistance in planning for change or buyouts of repeatedly flooded properties or properties that may be subject to future flooding due to climate change. Finally, through its impending Resilient Environments and Landscapes (REAL) regulatory reforms, DEP is committed to modernizing its environmental land use regulations, making them more proactive in the face of climate threats. By using the best available science to improve coastal, wetlands, and flood hazard standards, DEP will help ensure that what New Jersey builds today will stand the test of time and a changing climate.

Conclusion

New Jersey is in a state of transition. To meaningfully reduce and respond to

climate change, we must focus on the long-term growth potential and protection of our communities. We must commit ourselves to actions and investments that may take time to physically show their benefits, just like a warming climate took time to show us its fury. We must acknowledge that it may not be possible to measure our success in the next budget or on next ballot. We must have confidence that our success will be measured in the safety, security and resilience we leave our children and the communities they inherit. ■

Endnotes

1. *New Jersey Scientific Report on Climate Change, Version 1.0* (Eds. R. Hill, M.M. Rutkowski, L.A. Lester, H. Genievich, N.A. Procopio), 2020. nj.gov/dep/climatechange/docs/nj-scientific-report-2020.pdf
2. *Projected Changes in Extreme Rainfall in New Jersey* (DeGaetano, A., Northeast Regional Climate Center), 2021. nj.gov/dep/dsr/publications/projected-changes-rainfall-model.pdf
3. *New Jersey's Rising Seas and Changing Coastal Storms* (Kopp, et al., Report of the 2019 Science and Technical Advisory Panel). climatechange.rutgers.edu/images/STAP_FINAL_FINAL_12-4-19.pdf
4. nj.gov/dep/climatechange/docs/nj-gwra-80x50-report-2020.pdf
5. See Executive Orders Nos. 7, 8, 23, and 28 (2018), Nos. 89 and 92 (2019), No. 100 (2020), and Nos. 221 and 274 (2021).
6. 53 N.J.R. 1063(a)
7. 53 N.J.R. 588(a), 53 N.J.R. 2148(a)
8. 53 N.J.R. 1945(a)
9. nj.gov/dep/climatechange/docs/nj-climate-resilience-strategy-2021.pdf
10. experience.arcgis.com/experience/9daab51c2f5542969d50437522e012c4
11. nj.gov/dep/dwq/SWU_stormwaterutility.html

TRADEMARK

& COPYRIGHT SERVICES

Trademark –
Supply word and/or design plus goods and services.

Search Fees:

Combined Search - \$345
(U.S., State, Expanded Common Law and Internet)
Trademark Office - \$185
State Trademark - \$185
Expanded Common Law - \$185
Designs - \$240 per International class
Copyright - \$195
Patent Search - \$580 (minimum)

**INTERNATIONAL SEARCHING
DOCUMENT PREPARATION**

(for attorneys only – applications, Section 8 & 15,
Assignments and renewals.)

Research – (SEC – 10K's, ICC, FCC, COURT
RECORDS, CONGRESS.)

Approved – Our services meet standards set for us
by a D.C. Court of Appeals Committee

*Over 100 years total staff experience –
not connected with the Federal Government*

Government Liaison Services, Inc.
200 North Glebe Rd., Suite 321
Arlington, VA 22203
Phone: (703) 524-8200
Fax: (703) 525-8451
Major Credit Cards Accepted

Toll Free: 1-800-642-6564
WWW.TRADEMARKINFO.COM
Since 1957

LAWPAY®

AN AFFINIPAY SOLUTION

+



Member
Benefit
Provider

“I love LawPay! I’m not sure why I waited so long to get it set up.

– Law Firm in Ohio

Trusted by 50,000 law firms, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.



22% increase in cash flow with online payments



Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA



62% of bills sent online are paid in 24 hours

YOUR FIRM
LOGO HERE

Trust Payment
IOLTA Deposit

New Case Reference

**** * 9995

TOTAL: \$1,500.00

VISA



POWERED BY
LAWPAY

eCheck

DISCOVER

PAY ATTORNEY

PAYMENT
RECEIVED



Get started at
lawpay.com/njsba
855-504-7190

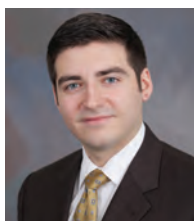
Data based on an average of firm accounts
receivables increases using online billing solutions.

LawPay is a registered agent of Wells Fargo Bank N.A.,
Concord, CA, Synovus Bank, Columbus, GA, and Fifth
Third Bank, N.A., Cincinnati, OH



How New Jersey's New Land Use Law Makes Way for Electric Vehicles

By Cosmas P. Diamantis



COSMAS P. DIAMANTIS serves as the Director of the Department of Community Development for the Township of Cherry Hill and in this role oversees all planning, zoning, and housing functions within the township. Prior to this role, Cosmas practiced for several years in the areas of land use, redevelopment, and local government law in New Jersey. Cosmas also serves on the Board of Directors for the NJSBA Land Use Section and on the Committee of Government, Public Sector, and Public Interest Lawyers.

It is not surprising that climate change has been deemed an existential threat to our world.¹ Indeed, several of Gov. Phil Murphy's earliest executive orders took meaningful steps to shift New Jersey away from relying on fossil fuels.² Perhaps most important was Executive Order No. 28 (2018), which ordered the preparation of a State Energy Master Plan to "provide a comprehensive blueprint for the total conversion of the State's energy production profile to 100% clean energy sources on or before January 1, 2050, and ... provide specific proposals to be implemented over the next ten (10) years in order to achieve the January 1, 2050 goal."³

The New Jersey State Master Energy Plan, adopted in 2019, determined, *inter alia*, that the transportation industry accounted for over 40% of state's carbon emissions, the largest of any other cause.⁴ "We have a moral responsibility to reduce our emissions so that we can mitigate climate change and improve public health[.]" said Joseph L. Fiordaliso, President of the New Jersey Board of Public Utilities (BPU).⁵ In an effort to address this issue, Murphy invested over \$100 million in clean, equitable transportation, has proposed to limit emissions under the state's Climate Pollutant

Reduction (CPR) rules, and has launched several electric vehicle (EV) incentive programs, such as Charge Up New Jersey and NJZIP.⁶

However, given the state's ambitious clean energy goals, it was glaringly apparent that a significant infrastructure of charging stations throughout the state would be necessary to support a future dominated by mostly consumer and commercial electric vehicles. Accordingly, on July 9, 2021, Murphy signed P.L.2021, c.171 (hereinafter "Public Law") into law, a proposed land use solution to promote and require the expansion of electric vehicle (EV) charging station infrastructure throughout the state. Accordingly, the focus of this article will be on the Public Law, its contents, requirements, and effectiveness.

The Framework and Key Definitions

The Public Law is comprised of six substantive sections that adds to, or amends various provisions of, the New Jersey Municipal Land Use Law (MLUL), *N.J.S.A. 40:55D-1, et seq.*⁷ Section 1 deems "Electric Vehicle Supply Equipment" (EVSE) and "Make-Ready" parking spaces, defined below, permitted accessory uses in all zoning districts of a municipality, and further exempts them from requiring use variances under the MLUL.⁸

Section 2 establishes an administrative approval framework for EVSE and Make-Ready parking spaces proposed at existing gasoline service stations, retail establishments, or any other existing building.⁹ This framework combines aspects of the zoning permit approval process with the completeness determination process for applications for development familiar to all who practice land use law in New Jersey.¹⁰

Section 3 requires the installation of EVSE and/or Make-Ready parking spaces for certain types of developments as a condition of preliminary site plan approval.¹¹ An application for a multiple

dwelling project with five or more units will require the installation of a certain number of EVSE and Make-Ready parking spaces based upon a calculation of required off-street parking.¹² All other applications involving a parking lot or garage not covered by the aforementioned section shall be required to provide a certain number of Make-Ready parking spaces based upon the number of off-street parking spaces provided by the project.¹³ Unlike multiple dwelling projects, there is no requirement that EVSE ever be installed in these Make-Ready parking spaces.¹⁴ Moreover, single family homes and retailers that provides 25 or fewer off-street parking spaces are exempt from providing EVSE or Make-Ready parking spaces.¹⁵

Section 4 directs the New Jersey Department of Community Affairs (DCA) to "publish a model land use ordinance to address installation, sightline, and setback requirements and other health- and safety-related specifications" for EVSE and Make-Ready parking spaces.¹⁶ The DCA Model Ordinance "shall be effective in each municipality, except that a municipality may deviate from the reasonable standards set forth in the model land use ordinance by adoption of an ordinance."¹⁷

Sections 5 and 6 added the terms "EVSE" and "Make-Ready" to the MLUL definitions section. Specifically, the term EVSE is defined as follows:

"Electric vehicle supply equipment" or "electric vehicle service equipment" or "EVSE" means the equipment, including the cables, cords, conductors, connectors, couplers, enclosures, attachment plugs, power outlets, power electronics, transformer, switchgear, switches and controls, network interfaces, and point of sale equipment and associated apparatus designed and used for the purpose of transferring energy from the electric supply system to a plug-in electric vehicle. "EVSE" may deliver either alternating cur-

rent or, consistent with fast charging equipment standards, direct current electricity. "EVSE" is synonymous with "electric vehicle charging station."¹⁸

The term "Make-Ready" is defined as follows:

"Make-Ready" means the pre-wiring of electrical infrastructure at a parking space, or set of parking spaces, to facilitate easy and cost-efficient future installation of Electric Vehicle Supply Equipment or Electric Vehicle Service Equipment, including, but not limited to, Level Two EVSE and direct current fast chargers. Make Ready includes expenses related to service panels, junction boxes, conduit, wiring, and other components necessary to make a particular location able to accommodate Electric Vehicle Supply Equipment or Electric Vehicle Service Equipment on a "plug and play" basis. "Make-Ready" is synonymous with the term "charger ready," as used in P.L.2019, c.362 (C.48:25-1 et al.).¹⁹

Administrative Approval Process for EVSE and Make-Ready

The Public Law amended the MLUL to provide for an administrative review process for EVSE and Make-Ready parking spaces when proposed at an existing gasoline service station, an existing retail establishment, or any other existing building.²⁰ These applications "shall not be subject to site plan or other land use board review, shall not require variance relief pursuant to [the MLUL] or any other law, rule, or regulation, and shall be approved through the issuance of a zoning permit," provided certain statutory requirements are met.²¹

The first of these requirements is that the proposed installation of EVSE or Make-Ready parking spaces cannot not violate bulk requirements applicable to the property, any conditions from the original final approval of the site plan, nor subsequent approvals for the existing gasoline service station, retail establish-

ment, or other existing building.²² The second is that “all other conditions of prior approvals for the gasoline service station, the existing retail establishment, or any other existing building continue to be met.”²³ And the last requirement is that the proposed installation of EVSE or Make-Ready parking spaces complies with the state Uniform Construction Code Act (UCC), *N.J.S.A. 52:27D-119, et seq.*, any safety standards concerning the installation of EVSE or Make-Ready parking spaces, and any other state rule or regulation concerning electric vehicle charging stations.²⁴

Unlike a typical zoning permit, which must be issued or denied within 10 business days following receipt of said application,²⁵ the administrative review process for EVSE and Make-Ready parking spaces incorporates a completeness determination prior to the issuance of a zoning permit.²⁶ Specifically, an application for EVSE or Make-Ready parking spaces pursuant to *N.J.S.A. 40:55D-66.19* shall be deemed complete if the administrative officer determines the application, required fees, and all necessary documentation to be complete.²⁷ Moreover, the administrative officer may issue a notice of incompleteness within 20 days after the filing of the application²⁸ or “a one-time written correction notice” within 20 days after filing of the application that details all deficiencies in the application and identifies any additional information “explicitly necessary to complete a review of the permit application.”²⁹

Unfortunately, this new hybrid administrative review process unnecessarily complicates existing practices related to the issuance of local zoning permits, overburdens administrative officers that will be charged with managing this new review process, and is ambiguous as to what happens when requirements are not met.

For instance, the new process outlined in the Public Law creates a hybrid-type

review process by incorporating the completeness determination review typically applicable only to “applications for development.”³⁰ As such, the administrative officer, who may not be familiar with completeness determinations, must now learn this new process and how to apply it in the case.

Second, the process is unclear as to how the zoning permit approval process fits in to this new review process. While the Public Law provides 20 calendar days for a completeness determination, it did not specify the process after an application is deemed complete. Presumably, the administrative officer would have 10 business days from the completeness determination to grant or deny the application as is typical for any zoning permit. Moreover, the shift between calendar days and business days when processing these types of applications may lead to confusion.

Third, the procedural and substantive review needed for a completeness determination and permit issuance is extensive, requiring the administrative officer to review bulk standards for the property, check all prior and current conditions of approval and any other conditions of prior approval (which are typically found in prior resolutions and/or site plans), verify compliance with the newly adopted design standards as set forth in the DCA Model Ordinance, and confirm compliance with the UCC. Putting aside the issue of determining compliance with prior resolutions of approval and the new design standards contained within the DCA Model Ordinance, the administrative officer who processes zoning permits will not likely be able to confirm compliance with the UCC, which is a function typically performed by the construction official at the time the appropriate construction permits are submitted to them for review. Accordingly, the construction official will need to be made part of this review process prior to the issuance of a zoning permit. Prac-

tically, however, the administrative officer will likely defer compliance with the UCC to the construction official during their formal review of construction permits.

Lastly, the administrative review process is ambiguous as to what happens when the requirements for the issuance of a zoning permit are not met. For example, let’s say an application for EVSE does not comply with the property’s bulk regulations and violations a condition of approval on a prior site plan resolution. Can the administrative officer now require the applicant to obtain a bulk variance or site plan review by the land use board? But if so, does this not contradict specific provisions exempting these permit applications from variances and site plan review? The language in the Public Law becomes circular in this way (e.g. — so long as the application complies with bulk regulations, no bulk variance can be required). However, given the Public Law conditions the exemption from bulk variances and site plan review on compliance with the requirements, it follows that if an application does not comply with the requirements, relief may be sought by way of a bulk variance or relief of condition before a land use board within the municipality.

Required Make-Ready and EVSE for Site Plan Applications

1. Requirements for Multiple Dwelling Developments

The MLUL now requires the installation of EVSE and Make-Ready parking spaces as a condition of preliminary site plan approval for all applications “involving” a multiple dwelling project with five or more units.³¹ The phrase “multiple dwelling” specifically includes include a “a building held under a condominium or cooperative form of ownership, a mutual housing corporation, or a mixed-use development.”³²

A developer or owner is required to

prepare at least 15% of required off-street parking spaces as Make-Ready parking spaces and install EVSE in at least one-third of these Make-Ready parking spaces.³³ An additional one-third of the original Make-Ready parking spaces must be installed with EVSE within three years following the issuance of a certificate of occupancy,³⁴ with the remaining EVSE installation required to occur within six years from the issuance of the certificate of occupancy.³⁵ The MLUL further requires that throughout the installation of EVSE in the Make-Ready parking spaces that 5% of the EVSE be accessible to individuals with disabilities.³⁶ Of course, a developer or owner may install EVSE “at a faster or more expansive rate than as required by this subsection.”³⁷

By way of an example, let’s take a rental housing development project consisting of 75 rental apartment units that requires preliminary and major site plan approval and at least 100 off-street parking spaces pursuant to the local ordinance. In this example, the developer will be required to provide at least 15 Make-Ready parking spaces for the development, with at least five EVSE installations. The next five EVSE installations will be due within three years following the issuance of the certificate of occupancy, with the remaining five EVSE installations due within three years thereafter. At least one of these 15 EVSE installations must be accessible to individuals with disabilities. Note that this installation requirement remains the same regardless of how many parking spaces are provided for onsite. It is also remains the same regardless of whether the developer voluntarily provided more Make-Ready parking spaces since as the statutory language requiring installation specifically applies to the “original 15%” Make-Ready parking spaces only.

While these requirements seem simple and straightforward, a closer examination reveals several ambiguities without a clear solution. First, the use of the

word “involving” is vague on exactly what types of applications should require compliance with the Public Law. For example, is compliance required for an existing multiple dwelling development that is subject to a site plan application even when no new units are being added? Similarly, would it apply to an existing mixed-use development where the subject of the site plan application is a commercial structure only? Would an increase in density for an existing development calculate the 15% on the parking spaces required for the increase in density or for the entire existing development? These questions are just a small sample of the various situations municipalities and developers will need to address, and unfortunately the Public Law and DCA Model Ordinance do not offer a clear solution.

Second, while it is clear that EVSE and Make-Ready parking spaces are required as a condition of preliminary site plan approval, thus exempting at the time the Public Law was passed all existing preliminary site plan approvals, it is unclear if this would exempt an amended preliminary site plan application. What if the amendment is necessitated by a minor design change caused by comments from an outside agency? Does this apply to minor site plans?

Third, the phrase “multiple dwelling” is not well defined by the Public Law. Specifically, it is unclear whether hybrid residential and institutional uses, such as assisted living and memory care facilities, would be subject to the required 15% requirement or the more “relaxed” Make-Ready parking space provisions discussed in the next section. Again, the fact that these, and likely other, ambiguities are readily noticeable upon review of the Public Law, there is a significant risk of inconsistent interpretation by and among municipalities and developers.

2. Requirements for All Other Developments with a Parking Lot or

Garage

For all other applications, not covered by *N.J.S.A. 40:55D-66.20(a)(1)* (certain multiple dwellings project), “involving” a parking lot or garage, the developer or owner must provide a minimum number of Make-Ready parking spaces, depending on the number of parking spaces being provided on-site.³⁸ It must be emphasized that this requirement is based upon the off-street parking spaces provided on-site, and not based upon required off-street parking spaces.

Accordingly, if the development has 50 or fewer off-street parking spaces on-site, the developer must provide at least one Make-Ready parking space.³⁹ The MLUL requires at least two Make-Ready parking spaces if 51-75 off-street parking spaces are provided on-site,⁴⁰ at least three Make-Ready parking spaces if 76-100 off-street parking spaces are provided,⁴¹ at least four Make-Ready parking spaces, with at least one being accessible for individuals with disabilities, if 101-150 off-street parking spaces are provided,⁴² and 4% Make-Ready parking spaces, with at least 5% of those accessible to individuals with disabilities, if over 150 off-street parking spaces are provided.⁴³ Unlike with multiple dwelling applications, there is no requirement to actually install EVSE in these required Make-Ready parking spaces. This notwithstanding, a developer may install EVSE in lieu of providing Make-Ready parking spaces.⁴⁴

For example, a new warehouse building that requires preliminary and final major site plan approval and proposes 140 off-street parking spaces, will be required to install at least four Make-Ready parking spaces, with one of them being accessible to individuals with disabilities. In lieu of providing the Make-Ready parking spaces, the developer may install EVSE on-site.

Here, similar ambiguities as noted in the previous section exist. For example, the use of the word “involving” is more

ambiguous in this section because most development in the state “involve” a parking lot or garage. Again, would a small addition to an existing large commercial site require the installation of Make-Ready parking spaces based upon all the parking provided, or just the parking applicable to the addition?

3. Other General Regulations and Exemptions

Notwithstanding the requirements summarized above, the law specifically exempts “retailers” that provide 25 or fewer off-street parking spaces and owners or developers of single-family homes from providing any Make-Ready parking spaces or EVSE.⁴⁵ Any fractional calculations for Make-Ready parking spaces or EVSE shall be rounded up to the next full parking space.⁴⁶ Any permitting applications solely for the installation of EVSE as a permitted accessory use shall not be subject to any review based upon parking requirements.⁴⁷ The law also imposes an obligation on power companies funding the installation of EVSE or Make-Ready parking spaces to collaborate with developers and owners, in consultation with the Board of Public Utilities, to ensure these provisions are implemented.⁴⁸

Most beneficial to developers and owners is the requirement that Make-Ready parking spaces and EVSE be counted as two parking spaces for purposes of complying with the minimum parking requirements.⁴⁹ This benefit, however, can only be used to reduce the minimum parking requirements by up to 10%.⁵⁰ For example, let’s take a commercial project that requires a minimum 100 off-street parking spaces pursuant to the local ordinance, but site constraints prevent the developer from providing more than 90 off-street parking spaces. Prior to these EV infrastructure requirements, the developer would have sought a bulk variance for 10 parking spaces. Here, however, the developer is required to provide at least three Make-Ready parking spaces,

so the bulk variance request would be reduced to seven parking spaces, and moreover, if the developer voluntarily provided 10 Make-Ready parking spaces and/or EVSE, the bulk variance for parking would no longer be required since the statute allows a developer to reduce the minimum parking requirements by 10% through the installation of Make-Ready parking spaces or EVSE, which count as two parking spaces.

Like other sections within the Public Law, some practical ambiguities continue to exist. For instance, there is no definition of a “retailer” in the Public Law, MLUL, or the DCA Model Ordinance, which will leave municipalities to define it as they see most appropriate. However, was it the intent of the Public Law to not exempt a small office building or restaurants from providing Make-Ready parking spaces if they have fewer than 25 parking spaces onsite? Similarly, while single family homes are exempt, does that mean 2-, 3-, and 4- family homes are not exempt from providing Make-Ready parking spaces? Does it matter if they are attached or detached homes? Does existing EVSE or Make-Ready parking spaces count toward the required installation and/or would these give the developer the benefit of counting each space as two parking spaces?

The DCA Model Ordinance

A major component of the Public Law was directing the DCA to “publish a model land use ordinance to address installation, sightline, and setback requirements and other health- and safety-related specifications for electric vehicle supply equipment and Make-Ready parking spaces and shall post the model land use ordinance on the department’s Internet website.”⁵¹ The DCA Model Ordinance is effective in every municipality upon its publication and municipalities may only deviate, by ordinance, from certain provisions of the DCA Model Ordinance to “adopt reasonable stan-

dards to address installation, sightline, and setback requirements or other health- and safety-related specifications for electric vehicle supply equipment and Make-Ready parking spaces.”⁵²

The DCA Model Ordinance was published on Sept. 1, 2021, with written support from the Department of Environment Protection and Board of Public Utilities.⁵³ It generally incorporates most of the provisions of the Public Law verbatim, with the most noteworthy additions being the design standards.⁵⁴

The DCA Model Ordinance also adds the definition of “Private EVSE,” which is “EVSE that has restricted access to specific users (e.g., single and two-family homes, executive parking fleet parking with no access to the general public),” and the definition of “Publicly-accessible EVSE,” which is “EVSE that is publicly available (e.g., park & ride, public parking lots and garages, on-street parking, shopping center parking, non-reserved parking in multi-family parking lots, etc.).”⁵⁵ These definitions become important when applying certain design standards, as discussed further below.

Section F of the DCA Model Ordinance contains the design standards for new EVSE and Make-Ready parking spaces.⁵⁶ This section is comprised of six subsections, each detailing a different design aspect related to EVSE and Make-Ready parking spaces. Subsection 1 is a general statement that the design criteria contained in Section F should be flexible and may vary based upon the design and use of the primary parking area.⁵⁷

Subsection 2 provides for installation requirements, essentially requiring EVSE and Make-Ready parking spaces comply with the provisions of the UCC and that accessible spaces be of a certain length and width.⁵⁸

Subsection 3 discusses the use of the EVSE and specifically reserves Publicly-accessible EVSE to charging EVs only.⁵⁹ In other words, the default requirement in the DCA Model Ordinance is that an

EVSE can only be occupied by a charging EV vehicle. It further places the burden on the municipality's police department to monitor and enforce this prohibition. Private EVSE shall be monitored by the property owner.⁶⁰

Subsection 4 discusses various safety details associated with EVSE, such as paint identification, adequate site lighting and landscape, bollards, setbacks, cord management systems, pedestrian circulation, etc.⁶¹ Subsection 5 details the required signs for EVSE, what information must be posted, and the size, shape, color, etc. of said signs.⁶² Subsection 6 details usage fees for EVSE.⁶³

There are two general issues with the DCA Model Ordinance that municipalities should consider revising. The first issue is the default provision of including "multi-family parking lots" within the definition of "Publicly-accessible EVSE." These are typically privately owned developments not open to the general public in the same way a restaurant is open to the general public. However, by including "multi-family parking lots" in this definition, they now become subject to extensive design standards that arguably should not apply to these private facilities.

The second issue is the default standard that only charging EVs can occupy an EVSE space. This effectively takes the EVSE parking space out of general use, which coupled with the two-parking space bonus, can leave a site severely under parked. At the very least, the default provisions should have permitted an EV or hybrid vehicle should be able to park in an EVSE space, or even a non-EV for a short time frame (e.g., 15 minutes).

While these provisions can be changed by a municipality to meet its community's specific needs and preferences, formal action is still needed by ordinance, which may function as an unnecessary barrier to needed amendments.

Conclusion

The Public Law and DCA Model Ordinance were necessary first steps toward achieving our state's energy goals to combat climate change and put us on the path to a clean energy future. While the Public Law and DCA Model Ordinance have many ambiguities and processes to correct, the spirit of the law can still be achieved so long as municipalities and developers work collaboratively to best implement the provisions of these laws. ■

Endnotes

1. [defense.gov/News/News-Stories/Article/Article/2582051/defense-secretary-calls-climate-change-an-existential-threat/](https://www.defense.gov/News/News-Stories/Article/Article/2582051/defense-secretary-calls-climate-change-an-existential-threat/); news.un.org/en/story/2018/05/1009782
2. *See Executive Order No. 7* (2018) (which directed New Jersey to begin the process of re-entering the Regional Greenhouse Gas Initiative); *and see Executive Order No. 8* (2018) (which emphasized the vital importance of offshore wind energy to the State of New Jersey)
3. *See Executive Order No. 28* (2018)
4. New Jersey State Master Energy Plan (2019)
5. nj.gov/dca/news/news/2021/20210908.shtml
6. nj.gov/dca/news/news/2021/20210908.shtml
7. pub.njleg.state.nj.us/Bills/2020/PL21/171_.PDF
8. N.J.S.A. 40:55D-66.18
9. N.J.S.A. 40:55D-66.19
10. *Id.*
11. N.J.S.A. 40:55D-66.20
12. N.J.S.A. 40:55D-66.20(a)(1)
13. N.J.S.A. 40:55D-66.20(b)(1)
14. *Id.*
15. N.J.S.A. 40:55D-66.20(c)
16. N.J.S.A. 40:55D-66.21(a)(1)
17. N.J.S.A. 40:55D-66.21(b)(1)
18. N.J.S.A. 40:55D-4
19. N.J.S.A. 40:55D-5
20. N.J.S.A. 40:55D-66.19(a)
21. *Id.*
22. N.J.S.A. 40:55D-66.19(a)(1)
23. N.J.S.A. 40:55D-66.19(a)(2)
24. N.J.S.A. 40:55D-66.19(a)(3)
25. N.J.S.A. 40:55D-18
26. N.J.S.A. 40:55D-66.19(b)
27. N.J.S.A. 40:55D-66.19(b)(1)
28. N.J.S.A. 40:55D-66.19(b)(2)
29. N.J.S.A. 40:55D-66.19(b)(3)
30. *See generally*, N.J.S.A. 40:55D-10.3
31. N.J.S.A. 40:55D-66.20(a)(1)
32. *Id.*
33. N.J.S.A. 40:55D-66.20(a)(1)(a)
34. N.J.S.A. 40:55D-66.20(a)(1)(b)
35. N.J.S.A. 40:55D-66.20(a)(1)(c)
36. N.J.S.A. 40:55D-66.20(a)(2)
37. N.J.S.A. 40:55D-66.20(a)(3)
38. N.J.S.A. 40:55D-66.20(b)(1)
39. N.J.S.A. 40:55D-66.20(b)(1)(a)
40. N.J.S.A. 40:55D-66.20(b)(1)(b)
41. N.J.S.A. 40:55D-66.20(b)(1)(c)
42. N.J.S.A. 40:55D-66.20(b)(1)(d)
43. N.J.S.A. 40:55D-66.20(b)(1)(e)
44. N.J.S.A. 40:55D-66.20(b)(2)
45. N.J.S.A. 40:55D-66.20(c)
46. N.J.S.A. 40:55D-66.20(f)
47. N.J.S.A. 40:55D-66.20(g)
48. N.J.S.A. 40:55D-66.20(h)
49. N.J.S.A. 40:55D-66.20(e)
50. *Id.*
51. N.J.S.A. 40:55D-66.21(a)(1)
52. N.J.S.A. 40:55D-66.21(b)
53. nj.gov/dca/dlps/home/modelEVordinance.shtml
54. *See generally*, *DCA Model Ordinance*
55. *DCA Model Ordinance*, Section B
56. *DCA Model Ordinance*, Section F
57. *DCA Model Ordinance*, Section F(1)
58. *DCA Model Ordinance*, Section F(2)
59. *DCA Model Ordinance*, Section F(3)
60. *Id.*
61. *DCA Model Ordinance*, Section F(4)
62. *DCA Model Ordinance*, Section F(5)
63. *DCA Model Ordinance*, Section F(6)



C-PACE Legislation Gets a Major Upgrade, Serving as a Catalyst for Meeting New Jersey's Climate Change Goals

By Joshua V. Berliner



JOSHUA V. BERLINER is an associate at McManimon, Scotland & Baumann, LLC. His practice focuses on advising private & public clients on issues related to environmental law, redevelopment and land use, sustainable development, clean energy and resiliency, and environmental litigation.

C-PACE Legislative History in New Jersey

New Jersey's latest legislation establishing a statewide "Garden State" Commercial Property Assessed Clean Energy (C-PACE) Program, which is expected to go into effect this summer, will help provide the up-front capital necessary to fund much needed energy efficiency upgrades and renewable energy infrastructure projects on commercial properties across the state. On Aug. 24, 2021, Gov. Phil Murphy signed into law A2374 (now codified at N.J.S.A. 34:1B-374, et seq.), which "directs [the New Jersey Economic Development Authority (the "EDA")] to establish [a] program for public or private financing of certain renewable energy, water, and storm resiliency projects through use by municipalities of voluntary special assessments for certain property owners" (the C-PACE Law).¹ Prior to the C-PACE Law, Governor Chris Christie signed S1406 into law on Jan. 17, 2012 (now codified at N.J.S.A. 40:56-1.4, et seq.)—a prior iteration of the C-PACE Law still in effect today—which includes a similar mechanism to

provide up-front capital for similar types of projects (the Current Law).² The Current Law will remain in effect until the date the EDA publishes the information required by the C-PACE Law to establish the Garden State C-PACE Program.³

In a typical C-PACE transaction (and under both the C-PACE Law and the Current Law), a property owner receives a loan from a traditional lender or from C-PACE bond proceeds (issued by either a municipality or county improvement authority pursuant to certain terms and conditions) to pay 100% of the costs of a qualified project. Upon completing the project, the municipality charges the property owner a special assessment on the subject property tax bill in an amount equal to the loan repayments, plus administrative costs. The municipality then uses the special assessment payments to pay the lender (or bondholders). The special assessment loan repayments are typically less than the energy savings produced by the C-PACE improvements, resulting in an immediate cash flow benefit to the property owner.

However, since its passage in 2012, the Current Law has been largely ineffective at attracting the capital providers necessary to fund such projects in the state. Under the Current Law, the governing body of a municipality, upon application to and approval by the Director of the Division of Local Government Services in the Department of Community Affairs, “may undertake the financing of the purchase and installation of renewable energy systems and energy efficiency improvements made by property owners.”⁴ Therefore, under the Current Law, the only projects eligible for this program are installations of renewable energy systems and energy efficiency improvements. Additionally, the Current Law does not establish a statewide program—meaning there is no statewide standardization of processes and procedures and limited to no access to addi-

tional state agency-level funding or professional expertise.

C-PACE Law’s Improvements on the Current Law’s Shortcomings

The C-PACE Law is well-positioned to resolve the Current Law’s shortcomings. Under the C-PACE Law, commercial property owners can borrow money for not only renewable energy systems and energy efficiency improvements, but also for “energy storage, microgrid, water conservation improvements, stormwater management systems, electric vehicle charging infrastructure, flood resistant construction improvements, and hurri-

guidelines;⁷ (ii) contract with third-party administrators to implement and/or administer same;⁸ (iii) partner with state government agencies or instrumentalities for oversight and funding assistance;⁹ and (iv) establish a loss revenue and/or issue guarantees “to mitigate the repayment risk assumed by capital providers providing direct financing”¹⁰—none of which is currently provided for under the Current Law. Additionally, the future EDA guidelines must include that in the event the property owner fails to pay the special assessment, the lender shall be secured by a first lien on the property, akin to a tax lien, enforced by

Under the C-PACE Law, commercial property owners can borrow money for not only renewable energy systems and energy efficiency improvements, but also for “energy storage, microgrid, water conservation improvements, stormwater management systems, electric vehicle charging infrastructure, flood resistant construction improvements, and hurricane resistant construction improvements.”

cane resistant construction improvements.”⁵ This is a much broader subset of projects than the subset of projects that qualify under the Current Law.

In addition, the C-PACE Law requires the EDA to create two types of programs, both of which are voluntary for authorized municipalities and counties to participate in. The first type is the Garden State C-PACE Program—which any municipality in the state can opt into by adopting an ordinance and signing a program agreement with the EDA.⁶ The Garden State C-PACE Program will help facilitate financing C-PACE projects by enabling the EDA to: (i) develop uniform assessment documents and project

the municipality—a requirement not included in the Current Law.¹¹ This security allows for better interest rates, longer-term financing, and transferability of the loan to a new property owner if the property is sold. The EDA has 270 days from the signing of the C-PACE Law to create program guidelines, procedures and model documents.¹²

The second program type is local C-PACE programs—where the top third of all municipalities in the state in terms of U.S. Census population size (approximately over 13,500 people) and counties may adopt an ordinance creating their own C-PACE programs.¹³ The Current Law does not provide counties the ability to

establish their own C-PACE programs. Such authorized municipalities and counties can contract with either a county improvement authority or private parties to implement and/or administer same, which offers further access to financial resources and professional expertise than is available under the Current Law.¹⁴ Taken together, both programs offer property owners, municipalities, and counties more flexibility, financing resources, and ease of implementation than the Current Law provides.

The financing terms as detailed in the C-PACE Law are an upgrade over those provided for by the Current Law as well.

minimum eligibility criteria not provided for in the Current Law.¹⁷ Same provides more assurances and confidence to municipalities, county improvement authorities, and capital providers to be more willing to make such financial investments.¹⁸

Other Statewide Benefits of the C-PACE Law

The C-PACE Law is expected to have a significant positive impact on the state's overall environmental footprint to meet its climate change goals. On Jan. 27, 2020, Murphy unveiled the state's Energy Master Plan (EMP), which outlines key

water quality, strengthening the electric grid against severe weather disruptions, and saving consumers money on their monthly utility bills.²¹

Also of note is that as mentioned above, the C-PACE Law now explicitly includes electric vehicle (EV) charging infrastructure as an eligible C-PACE project. This will help the state satisfy the EV charging stations mandate as provided by S2252 signed into law by Murphy on Jan. 17, 2020, (now codified at N.J.S.A. 48:25-1, et seq.),²² help tackle the issue of “range anxiety”²³ so often associated with EVs, and help municipalities satisfy their requirements to plan for EV charg-

...[T]he C-PACE Law may be the impetus needed to spur advancement and implementation of desperately needed upgrades to the most underprivileged communities in the state. Historically, New Jersey's low-income communities and communities of color have been subject to a disproportionately high number of environmental and public health stressors, including pollution from numerous industrial, commercial, and governmental facilities located in those communities and, as a result, suffer from increased adverse health effects...

The C-PACE Law explicitly enables property owners to apply for refinancing of an investment in an existing improvement completed up to three years prior to the submission of same to either the Garden State C-PACE Program or local C-PACE programs—which is not provided for in the Current Law.¹⁵ Although both laws allow for funding through non-recourse bonds issued by either authorized municipalities or county improvement authorities, the C-PACE Law also allows capital providers to directly finance project costs for C-PACE projects under either the Garden State C-PACE Program or local C-PACE programs.¹⁶ Additionally, the C-PACE Law requires that the recipient of C-PACE financing meet certain

strategies to reach 100% clean energy by 2050 and achieve the mandates under (i) the Global Warming Response Act of reducing state greenhouse gas emissions; and (ii) the Clean Energy Act of 2018.¹⁹ The EMP includes clear meaningful goals to reduce energy use through energy efficiency measures and specifically mentions C-PACE financing (under Goal 7.3.2) as a means “to facilitate greater private lender funding, and on relatively better terms” to lower the cost of capital for such projects.²⁰ The C-PACE Law certainly aligns with the EMP and helps achieve the mandates set forth in the Global Warming Response Act and the Clean Energy Act of 2018 through reducing greenhouse gas emissions, improving

ing infrastructure pursuant to S606 signed into law by Murphy on Nov. 6, 2019, (now codified at N.J.S.A. 40:55D-28, et seq.).²⁴

Additionally, the C-PACE Law may be the impetus needed to spur advancement and implementation of desperately needed upgrades to the most underprivileged communities in the state. Historically, New Jersey's low-income communities and communities of color have been subject to a disproportionately high number of environmental and public health stressors, including pollution from numerous industrial, commercial, and governmental facilities located in those communities and, as a result, suffer from increased adverse health effects

including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental disorders.²⁵ Same was the impetus for Murphy signing the Environmental Justice Law into law on Sept. 18, 2020, (now codified at N.J.S.A. 13:1D-157 et seq.), which requires the New Jersey Department of Environmental Protection (DEP) to evaluate the environmental and public health impacts of certain facilities on “overburdened communities” when reviewing certain permit applications.²⁶ The DEP estimates that 310 municipalities with populations totaling approximately 4,489,000 have “overburdened communities” within their municipalities²⁷—many of which are the top third of municipalities in terms of population size to qualify for creating its own C-PACE programs. Aside from the flexibility and financial resources the C-PACE Law can provide to such overburdened communities, the C-PACE Law specifically includes improvements—mainly water conservation improvements, stormwater management systems, flood resistant construction improvements, and hurricane resistant construction improvements—that will help reduce the environmental and public health stressors mentioned above. ■

Endnotes

1. A. 2374, 219th Leg., Reg. Sess. (N.J. 2021), now codified at N.J.S.A. 34:1B-374, et seq.
2. S. 1406, 214th Leg., Reg. Sess. (N.J. 2012), now codified at N.J.S.A. 40:56-1.4, et seq.
3. N.J.S.A. 34:1B-378(5)(a); N.J.S.A. 40:56-1.4(b); N.J.S.A. 40:56-13.1(a)(2); N.J.S.A. 40:56-13.2(d).
4. N.J.S.A. 40:56-1.4(a).
5. N.J.S.A. 34:1B-375.
6. N.J.S.A. 34:1B-377.
7. N.J.S.A. 34:1B-377(a).
8. N.J.S.A. 34:1B-377(b).
9. N.J.S.A. 34:1B-377(c).
10. N.J.S.A. 34:1B-377(d).
11. N.J.S.A. 34:1B-378(d), (g).
12. N.J.S.A. 34:1B-378(a). Regulations for the Garden State C-PACE Program are expected to be finalized by the EDA this summer—the retrofit program is expected to open first, followed by the rules for new construction and refinancing or “recapitalization” soon thereafter. Jonathan Cloud, *NJ C-PACE Regulations & Guidelines Being Developed*, New Jersey PACE (March 14, 2022), newjerseypace.org/nj-c-pace-regulations-guidelines-being-developed/.
13. N.J.S.A. 34:1B-375; N.J.S.A. 34:1B-379(a).
14. N.J.S.A. 34:1B-379(b)(1).
15. N.J.S.A. 34:1B-382(a).
16. N.J.S.A. 34:1B-382(c) & (d).
17. Such minimum requirements include: (i) no defaults on mortgage loans, taxes and other charges that encumber the subject property; (ii) neither loan recipient nor subject property is subject to bankruptcy proceedings; (iii) C-PACE loan, together with all outstanding mortgage and lien obligations on a property, cannot exceed 90% of the property’s appraised value after accounting for the increase in value resulting from the C-PACE project; (iv) C-PACE loan term is limited to the lesser of 30 years or the weighted average useful life of the improvements being financed; and (v) existing mortgage lenders must consent in writing to C-PACE loans. N.J.S.A. 34:1B-378(b)(1)–(5).
18. For municipalities and county improvement authorities specifically, any direct financing provided by capital providers and any C-PACE bonds they issue are mandated by the C-PACE Law to not (i) be secured by the full faith and credit of any public entity; (ii) be direct or general obligations of such issuers; (iii) be considered gross debt of such municipalities; or (iv) count towards the debt limit of such municipalities. N.J.S.A. 34:1B-382(b)(3), (c), (d).
19. N.J. Bd. of Pub. Utils., 2019 New Jersey Energy master Plan – Pathway to 2050 11, 27 (2019), nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf.
20. *Id.* at 222–23.
21. Emma Horst-Martz and William Amann, *Climate Change Reports is More Evidence Murphy Should Sign C-PACE Bill*, ROI-NJ (August 9, 2021), roi-nj.com/2021/08/09/opinion/op-ed/climate-change-reports-is-more-evidence-murphy-should-sign-c-pace-bill/. See *Benefits*, New Jersey PACE, newjerseypace.org/benefits/ (last visited March 25, 2022) (includes list of benefits C-PACE provides to various stakeholders).
22. S. 2252, 218th Leg., Reg. Sess. (N.J. 2020), now codified at N.J.S.A. 48:25-1, et seq.
23. Rob Stumpf, *Americans Cite Range Anxiety, Cost as Largest Barriers for New EV Purchases: Study*, The Drive (February 26, 2019), thedrive.com/news/26637/americans-cite-range-anxiety-cost-as-largest-barriers-for-new-ev-purchases-study.
24. S. 606, 218th Leg., Reg. Sess. (N.J. 2019), now codified at N.J.S.A. 40:55D-28, et seq.
25. *What is Environmental Justice?*, NJDEP, nj.gov/dep/ej/index.html (last updated March 17, 2022).
26. *New Jersey’s Environmental Justice Law*, NJDEP, nj.gov/dep/ej/policy.html#ejlaw (last updated January 6, 2022).
27. *Id.*



PHOTO COURTESY OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Negotiating Solar Renewable Energy Agreements

What You Should Know

By Barbara J. Koonz



BARBARA J. KOONZ is a partner at Greenbaum, Rowe, Smith and Davis and is Chair of the Energy, Renewable Resources & Sustainable Development Practice Group. She regularly represents commercial entities and solar providers in connection with solar project development.

In a push to decarbonize energy systems, climate action initiatives are evolving and intensifying both nationally and globally. Driven by clean energy initiatives and by governmental and corporate sustainability goals, New Jersey continues to act as a leader in the development of solar projects, ranking eighth nationally with a total of 3,854.20 MW of installed solar, enough to power 659,176 homes.¹ The installation of solar renewable energy generation systems on and around commercial and industrial buildings in New Jersey is widespread and is projected to continue to grow.² This article discusses the most com-

mon types of solar energy-related agreements and issues that arise when negotiating such agreements. It is written from the vantage point of the property owner as prospective energy purchaser and possible future owner of the solar project.

While solar energy accounts for over 6.7% of the electricity consumed in New Jersey, that amount is likely to increase dramatically, spurred on by the New Jersey Energy Master Plan's goal of generating 34% of the state's required electricity by 2050.³ Moreover, generous economic incentives, including the New Jersey Board of Public Utilities' (BPU) Solar Renewable Energy Certificate Successor program,⁴ the Federal Investment Tax Credit, and corporate clean energy sustainability goals are likely to ensure continued growth of solar development.

Clients seeking advice regarding solar agreements often do so in response to a solicitation from a solar developer seeking to construct a solar facility on the client's property. These transactions typically require the negotiation of either: (i) a power purchase agreement (PPA); (ii) an engineering, procurement and construction (EPC) contract, and/or (iii) a ground or rooftop lease.

It is important to confirm that entering into a PPA, EPC or lease will not run afoul of other agreements related to the property or its operations, including notice or other provisions of lender agreements, existing leases, or third-party energy provider agreements.

Solar Power Purchase Agreements (PPA)

A solar PPA is an agreement in which a party agrees to purchase all of the electricity produced by a solar generation facility for an agreed upon price and term. Under the agreement, the seller (or power provider) of the electricity installs, owns, and operates a solar facility on the property of the buyer (or host) or on property contiguous to the buyer.⁵ PPAs are attractive to energy buyers because

they do not require capital expenditures, provide price certainty and savings from electricity purchased from the electric utility, and the power provider remains responsible for operating and maintaining the solar facility. PPAs are particularly attractive to governmental entities because public entities are unable to take advantage of the federal tax benefits applicable to solar projects.⁶ Under a PPA, the power provider uses the tax benefits

wear and tear. A decommissioning bond may be considered (and is sometimes required) for public projects. Because the cost of removal can be expensive, power providers may be inclined to agree on a favorable FMV price rather than incur the cost of removing a 15- to 20-year-old system.

(iii) *Obligation to Purchase Energy*: The buyer will be expected to purchase all of the energy produced by the system. The

PPAs are attractive to energy buyers because they do not require capital expenditures, provide price certainty and savings from electricity purchased from the electric utility, and the power provider remains responsible for operating and maintaining the solar facility.

and effectively shares those benefits with the buyer through a reduced price for electricity.

Key terms associated with PPAs include:

(i) *Energy Price and Term*: The price is set based upon a kWh rate that may be subject to a periodic escalation rate. Both the price and the escalation rate are subject to negotiation. Be careful not to agree to an escalation rate that is excessive.

(ii) *PPA Term*: The term of PPAs generally range between 15–25 years. Because solar facilities cease earning SREC IIs after the 15th year of service, many power providers will enter into 15-year agreements. From a buyer's perspective, a 25-year agreement is a long time to commit to technology that is likely to change considerably over the next two decades. It is important to include an end-of-term purchase option for fair market value (FMV). If the buyer does not exercise the option, the power provider should be required to remove the facility *in its entirety* and restore the property to its prior condition subject to reasonable

PPA should clearly state that the obligation to purchase arises when the energy is delivered to the buyer, not when it is generated by the system. Also, this section should clarify that the system has been designed to meet the BPU's net-metering requirements. Net-metering enables the buyer to sell power to the local utility when the system is producing more electricity than is being consumed at the site. Net-metering ensures that the buyer will be able to use or sell all of the energy it purchases from the power provider. In order to qualify for net-metering, the system must be designed to not generate more energy than that used by the customer during the prior year.

(iv) *Structural Integrity and Roof Warranties*: Prior to entering into a PPA, the property owner should confirm that the structural integrity of the building and rooftop can withstand the increased load of the installed solar facility. The buyer (or property owner) should require the power provider to obtain a certification of an independent engineer that has examined the property and concluded

that the property can accommodate the solar installation. The PPA should also require the power provider to secure from all roof warrantors written confirmation that the installation of the solar facility will not void or impair existing roof warranties. When roof replacement accompanies the solar project, it is critical that the roofing contractor and solar developer coordinate and that the structural analysis confirms support for the roof and the solar project as designed before roof replacement commences.

(iv) *System Design Approval*: While the system will be owned, designed, and installed by the power provider, the layout and specific location of the system components should be an exhibit to the PPA and subject to review and approval by the buyer (or property owner). The system design should limit roof penetrations and design drawings should depict their locations. If portions of the system are to be installed on canopy structures in a parking lot, it is important to review the specific design of these structures. The property owner should ascertain that the canopies do not create unsafe conditions and that snow removal equipment will be operable under the canopies. The PPA should further clarify that the buyer's approval of the system location drawings does not constitute a determination that the system has been designed or installed consistent with industry standards, applicable law, or the requirements of the agreement.

(v) *Access to the Property*: The PPA needs to confer access rights to the power provider so it can install, operate, and maintain the solar facility. The parties should designate a laydown area during construction. The power provider may be willing to accept a license to access and occupy the property but will most likely request an easement. The issuance of a narrowly tailored nonexclusive easement, limiting the scope of the easement to areas that

are necessary to access, is acceptable. If the buyer or property owner confers an easement, it should do so contingent upon the power provider executing a discharge of easement to be held in escrow by the property owner until the termination of the PPA. If a solar facility is to be installed on a site that is not owned by the electricity buyer, the system owner will likely require a lease with the property owner.

(vi) *Minimum Production Guarantee*: A buyer should request that the solar facility produce a minimum amount of electricity annually. A reasonable minimum production guarantee is 85%–90% of the system's capacity, adjusted for weather and other actual conditions. Power providers usually resist the inclusion of a production guarantee but will often agree after negotiating the annual percentage and the methodology for measuring performance.

(vii) *Early Termination Payment*: PPAs typically include a liquidated damages provision arising from a buyer default. The provision, generally referred to as an early termination payment (ETP), is a financial sum intended to compensate the power provider for all of the lost revenue and tax benefits it would suffer in the event of a buyer default. While the ETP amount decreases annually, it remains significant, particularly during the first six years of the agreement. If a power provider requires the inclusion of an ETP provision, the buyer should attempt to negotiate a reduction in the amount and should include in the PPA a requirement that the title to the solar facility be transferred to the buyer upon payment of the ETP. When negotiating default terms in the PPA, make sure to include a provision that provides the buyer with sufficient time to remedy any defaults.

(viii) *Environmental Attributes Ownership*: Under a PPA, the power provider generally retains ownership of the environmental attributes (i.e., environmental

benefits), including SREC IIs. Retaining ownership of SREC IIs enables the power provider to charge competitive kWh rates for energy. If a buyer needs to secure SREC IIs (or renewable energy certificates [RECs]) in order to meet corporate sustainability goals, it will need to negotiate with the power provider to obtain ownership of the SRECs or comparable RECs. Such a provision in a New Jersey PPA is unusual.

(ix) *Interconnection and Government Approvals*: The power provider is responsible for securing all government approvals to construct and operate the solar facility, including obtaining authority to interconnect the system to the local utility's electric grid. If a power provider is unable to secure interconnection approval, it is not required to proceed with the PPA and is not in default provided it diligently pursued the approval. The cost to obtain and complete interconnection should be the responsibility of the power provider. Power providers often seek the inclusion of a contract provision that permits the power provider to cancel the PPA if interconnection costs exceed an agreed upon cap. While securing interconnection approval is generally not difficult, capacity limitations on a local utility's system can sometimes be excessive causing the project to be uneconomic.

(x) *General Commercial Terms*: In addition to the above provisions, general commercial transaction agreement terms are in PPAs. Those terms include: maintenance requirements, assignment, insurance requirements, termination, force majeure, default provisions, indemnification, casualty loss, parties' representations and warranties, and purchase options.

Solar Engineering Procurement and Construction (EPC) Contracts

A solar engineering, procurement and construction (EPC) contract is an agreement under which a solar developer designs and constructs a solar generation

facility for a contract purchaser. A solar EPC contract is comparable to a design build contract and includes provisions usually found in a commercial construction agreement. Provided a system purchaser can use the Federal Investment Tax Credit (ITC) and the purchaser has sufficient capital to acquire the system, the purchase and ownership of a solar facility is generally more economically favorable than entering into a PPA. The downside of system ownership is that the owner is responsible for the operation of the system. Such operational risk can be minimized by entering into a long-term operations and maintenance agreement with the solar developer.

Key terms associated with a solar EPC include:

(i) *System Pricing:* The price for the construction of a solar facility is based upon a per kW dollar amount multiplied by the system's kW capacity. The per unit price will vary based upon a number of factors including the system size, the type of panels and the type of installation. For example, a ground mounted facility is less expensive than a parking canopy structure.

(ii) *Scope of Work, System Description and Location:* Exhibits to the EPC should contain a detailed description of the required scope of work relating to the design and construction of the solar facility. The work should be performed consistent with industry standards. The Scope of Work should include a description of the component parts of the system, including identification of (1) equipment manufacturers, (2) equipment model types, and (3) equipment quantities for all component parts. Exhibits to the EPC should include system design drawings showing the specific location of system components, including the location of proposed roof penetrations and the design associated with mounting and parking lot canopy structures.

(iii) *Construction Schedule, Penalties for Delay, Change Orders:* The EPC should include a construction schedule with deadlines for the receipt of governmental and interconnection approvals. The buyer should propose the inclusion of penalties for unreasonable construction delays if the contractor does not complete the project by an agreed upon date. The penalty amount should be based upon the "lost revenue" to the buyer resulting from the delay in the generation of SREC IIs. Change order provisions should also be included in an EPC. In the event of a change order, the parties should meet and confer to determine the appropriate adjustments to the contract price, if any, arising from the modifications to the Scope of Work.

(iv) *Milestone Payments:* The EPC should include a detailed construction milestone payment schedule. The schedule should include payments commencing upon the effective date of the contract through the date that the system achieves permission to operate from the BPU and the resolution of punch-list items. While the schedule is subject to negotiation, the buyer should undertake its best efforts to ensure that the contractor has sufficient economic incentive to promptly complete construction.

(v) *SREC Program and Net-Metering Eligibility:* The EPC should require the contractor to enroll the project in the BPU's Successor REC (SUSI) program and the net-metering program. Prior to the commencement of construction, the contractor should complete the SUSI Program registration process to ensure that the system qualifies for SREC IIs upon its receipt of permission to operate. Similarly, the contractor should be required to design the system so that the customer of record qualifies for net-metering.

(vi) *Government Approvals:* The contractor should be responsible for obtaining all governmental approvals. If approvals cannot be obtained despite the contractor's diligent effort, the agree-

ment may be terminated, and any payments made by the buyer should be refunded.

(vii) *Interconnection:* Under an EPC, the contractor typically reserves the right to terminate the contract if interconnection costs imposed by the local electric utility are higher than anticipated. Alternatively, the contractor may require the buyer to pay all interconnection costs. As discussed above, while interconnection costs for on-site generation projects are generally not problematic, circumstances may cause interconnection costs to render the project uneconomic. A reasonable approach to address this issue is to agree that one of the parties will be responsible for payment of the interconnection costs up to an agreed upon cap. If the costs exceed the cap, the party responsible for payment can terminate the agreement unless the other party agrees to pay the amount in excess of the cap.

(viii) *Owner and Operating Manuals, Warranties:* The contractor should provide multiple copies of the system's owners and operating manual. Also, the EPC should require the contractor to transfer to the buyer all manufacturer warranties associated with the equipment comprising the solar facility.

(ix) *Operations and Maintenance Agreement, System Monitoring:* Because the buyer will be responsible for operating and maintaining the system, it will be necessary for the buyer to enter into an operations and maintenance agreement with a qualified contractor. The O & M form of agreement should be reviewed during the EPC negotiation process and should include a detailed maintenance schedule. The O&M Agreement may include tracking and reporting energy production to PJM (regional transmission operator) to secure the issuance of RECs.

As discussed above, EPC contracts, like PPAs, will include the standard provisions of commercial construction contracts and agreements.

Lease of Property for the Installation of Solar

Solar developers regularly approach commercial property owners and owners of vacant land requesting that the owner lease its property for the installation of a solar facility to be used to generate energy to be sold to third parties or into the wholesale electric grid. Given the substantial number of commercial/industrial building rooftops in New Jersey, solar developers are interested in entering into rooftop leases so they can sell energy to a building tenant, an adjacent property, or in the New Jersey Community Solar (CS) program.⁷ Also, solar developers continue to seek to lease vacant property (e.g., farmland, Brownfields, landfills, etc.) for the installation of grid supply projects.

The solar lease process generally starts with the execution of an option agreement to enter into a lease. The option agreement permits the developer to conduct due diligence on the property and to obtain the required interconnection and governmental approvals. The duration of the option agreement should depend upon the complexity of the solar project and the anticipated timeframes to obtain project approvals. For example, a solar grid supply project on farmland or a closed landfill will require more time to secure project approvals than a CS project to be installed on a commercial rooftop. To avoid uncertainty, a fully negotiated form of lease should be agreed upon at the time of executing the option agreement and should be attached as an exhibit to that agreement.

Key terms associated with solar leases include:

(i) *Rental Payment Amount:* The annual rental amount for a solar lease is typically based upon the available square footage of a rooftop or the acreage of vacant property. The amount is subject to negotiation and is influenced by conditions associated with the project. As an alternative to paying a fixed amount based upon a per

square foot or per acre method, the rental income can be linked to the amount of electricity generated by the system multiplied by an agreed upon kWh rate. This approach, however, introduces some risk to the lessee by tying rental income to the project's performance.

(ii) *Term:* The term for solar leases is generally consistent with the expected useful life of the system—ranging from 15–25 years.

(iii) *Property Restoration and Decommissioning:* The lease should require the removal of the solar facility and restoration of the property at the end of the term. For larger scale projects, a property owner may want to request that the solar developer provide a decommissioning bond (or some other collateral) to ensure that the facility will be properly removed at the end of the term.

(iv) *Roof Warranties:* For rooftop leases, the lessor should be required to obtain a certification from all roof warrantors that the lessor's use of the rooftop will not void or impair any roof warranties.

(v) *Default Remedies:* The lessee is likely to propose a liquidated damages provision in the lease requiring the lessor to pay a substantial early termination payment (ETP) in the event of default. The lessor should resist the lessee's attempt to include such a broad liquidated damage provision in the lease. Rather, the parties should agree upon a reasonable cap on damages due to a default by the lessor.

(vi) *Non-disturbance Agreement:* The lease should require the lessor to request that any entity that has a lien on the property, agree to provide the lessee a non-disturbance agreement.

In addition to the above provisions, a lease for the installation of a solar facility should include typical provisions included in a commercial property lease, should address tax implications of the solar project and may include a number of the solar provisions reviewed in the PPA and EPC discussion.

The PPA, EPC and lease agreements

discussed are the most common, but are not the only commercial documents and agreements applicable to solar energy projects. Others may include additional energy services, such as solar plus battery storage or address broader microgrid capabilities. However, familiarity with the issues discussed herein should enable you to provide informed advice to your clients when they are interested in participating in transactions involving solar generation systems. ■

Endnotes

1. SEIA Solar Industry Association seia.org/smi
2. There are over 7,500 commercial and industrial solar installations in New Jersey, representing over 1,732 MWs of annual energy production. In the Matter of a Solar Successor Incentive Program Pursuant to P.L. 2018, Clean Energy Order, New Jersey Board of Public Utilities, Docket No. QO200 2018, July 28, 2021, (“SUSI Order”). nj.gov/bpu/pdf/boardorders/2021/20210728/8A%20ORDER%20Successor%20Solar%20Incentive.pdf
3. See 2019 New Jersey Energy Master Plan, Pathway to 2050, released January 2020. nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf
4. The SUSI Program, adopted by the BPU on July 28, 2021, replaces the BPU's original SREC program that closed on May 2020. SUSI Order at p.5–6. Projects participating in the SUSI Program earn one solar renewable energy certificate II (SREC II) for each MW of renewable energy generated. SREC IIs have a dollar value administratively determined by the BPU.
5. The New Jersey Community Solar program enables a qualified solar facility to sell energy to customers at locations other than the site of the solar facility. See N.J.S.A. 48:3-87.11 and N.J.A.C. 14:8-9.

BUILD YOUR NETWORK

JOIN ANY ONE
SECTION AND...

SAVE 50%

By joining a New Jersey State Bar Association (NJSBA) section, you gain access to a robust knowledge-sharing network of seasoned legal professionals via regular virtual and in-person meetings, webinars and emails. These peer-led groups help you network, learn best practices and keep you in the know of latest legal trends in your practice area.

Section members enjoy:

- Access to **CommunityNet**, our members-only **online community** where you can join discussions with other sections members, receive section related announcements, share files, network and much more!
- **30%** discounts on NJICLE meetings and events
- In-person and online networking opportunities year-round
- Special **25% SAVINGS** on advertising space in *New Jersey Lawyer*.

To take advantage of this offer, visit njsba.com and click on "join" to join a section or the Young Lawyers Division. Use **promo code 0976E**. You can also get in touch at membership@njsba.com for assistance.

This special offer is for current NJSBA members only, and cannot be used for renewal of section membership.

NJSBA

Join colleagues and keep current with new developments in these substantive areas of law.

Government attorneys deduct \$10 off regular section dues. Young lawyers, who join the Young Lawyers Division, pay only \$25 per section after joining YLD.

Administrative Law	\$35
Banking Law	\$35
Bankruptcy Law	\$35
Business Law	\$35
Casino Law	\$35
Certified Attorneys*	\$35
Child Welfare Law	\$35
Civil Trial Bar	\$35
Construction Law	\$35
Criminal Law	\$35
Dispute Resolution	\$35
Elder and Disability Law	\$35
Entertainment Arts and Sports Law	\$35
Environmental Law	\$35
Family Law	\$50
Federal Practice and Procedure	\$35
Health Law	\$35
Immigration Law	\$35
Individual Rights	\$35
Insurance Law	\$35
Labor and Employment Law	\$35
Land Use Law	\$35
Lesbian Gay Bisexual Transgender and Queer Rights	\$35
Local Government Law	\$35
Military Law and Veterans' Affairs	\$35
Minorities in the Profession	\$35
Municipal Court Practice	\$35
Product Liability and Mass Tort	\$35
Public Utility Law	\$35
Real Property Trust and Estate Law	\$35
Solo and Small-Firm	\$35
Taxation Law	\$35
Women in the Profession	\$35
Workers' Compensation	\$35
Young Lawyers Division**	\$25

* **Proof of certification required.**

** **Must be 36 years old or younger, or licensed for 10 years or less.**



Climate Change and Renewable Energy's Impacts on New Jersey's Agricultural Industry

By Lewis Goldshore



LEWIS GOLDSHORE practices in Princeton. His practice is devoted to environmental, agricultural and land use law. He serves as general counsel to the New Jersey Farm Bureau. Any opinions expressed in this article are his alone and do not necessarily represent the views of any of his clients.

According to the New Jersey Department of Agriculture, food and agriculture is New Jersey's third largest industry and provides billions of dollars of revenue to the state. It encompasses much more than the familiar Jersey tomatoes, cranberries, blueberries, and peaches. The industry's broad reach includes the production of a wide array of fruits, vegetables, and field crops; horticulture; fisheries; aquaculture; equine operations; and more than 50 wineries.

Agricultural operations are conducted on approximately 9,900 farms of all sizes that occupy nearly 750,000 acres of the state's landmass, of which some 240,000 acres have been permanently preserved.¹

Climate Change

New Jersey's agricultural community is especially vulnerable to significant risks associated with global warming, severe changes in weather and sea level rise. As a result, the industry has a vested interest and an important role in measures that address climate change and promote renewable energy.

The state's farmers and fishers experience the adverse effects due to climate change in an upfront and personal manner. Their experiences have been confirmed by numerous sources, including the New Jersey Climate Change Resource Center (the Center) at Rutgers which was directed in N.J.S.A. 18A:65-103.a. "to carry out collaborative and interdisciplinary research, analysis, and outreach activities that will help New Jersey adapt, mitigate, and prepare for climate change."

According to the Center's May 2020 report, climate change has resulted in a trifecta of challenges for the state's farmers: increased average temperatures, altered rainfall patterns and sea level rise. Growing seasons for certain crops may have been extended but that has been outweighed by the adverse impacts of extreme heat including crop productivity losses, livestock stress, farm worker health impacts, and the spread of pests, weeds, and pathogens from traditionally warmer states. Extreme weather events have contributed to increases in soil erosion, nutrient runoff, and crop damage. The consequences of sea level rise include saltwater intrusion, flooding, degradation of freshwater sources, and tree losses in tidal and estuarine areas.

The Center and others have identified adaptive approaches that the agricultural community can use to attempt to mitigate the impacts of global warming.

These include "diversifying crops, using hoop house or low tunnels to address weather variability, practicing various water-conservation methods, managing heat stress in livestock, elevating infrastructure in flood-prone areas...no- or low-till agriculture, cover crops, and...regenerative agriculture."²

Carbon sequestration is another technique that can reduce greenhouse gas (GHG) emissions by capturing and storing carbon dioxide in the soil. It has received increased governmental attention recently, including in the proposed Growing Cli-

As early as 1989, New Jersey recognized that global warming was likely to present serious risks for a coastal state. In Executive Order No. 219, Gov. Thomas Kean directed all state agencies to "foster energy conservation to the maximum extent practicable, in order to reduce emissions of carbon dioxide and other gases that contribute to global climate change."

mate Solutions Act (H.R. 2820 and S. 1251). The bill, which has passed the U.S. Senate, authorizes the U.S. Department of Agriculture to assist farmers, ranchers, and private forest landowners in participating in voluntary environmental credit markets through which agriculture and forestry credits may be bought and sold. Zippy Duvall, American Farm Bureau Federation's president, noted that the bill "acknowledges the potential of climate-smart farming while ensuring farmers would be respected as partners who can build on our strong foundation of environmental stewardship."³

The state's fishing industry has also been adversely affected by ocean warming. Species of cold and cool-water fish have shifted to the north, disrupting fishers and processing plants. Sea level rise and the increased risk of flooding threatens the infrastructure that supports the industry.

As early as 1989, New Jersey recognized that global warming was likely to present serious risks for a coastal state. In Execu-

tive Order No. 219, Gov. Thomas Kean directed all state agencies to "foster energy conservation to the maximum extent practicable, in order to reduce emissions of carbon dioxide and other gases that contribute to global climate change."

Over time, additional scientific evidence of climate change and its adverse impacts has been collected and analyzed. As a result, global warming was no longer viewed as a theory or a potential threat but had to be considered an actual threat.

In 2007, the New Jersey Legislature recognized that elevated GHG levels pre-

sented serious concerns for human, animal and plant life and that action—not just talk—was required to address the problem of global warming. The Global Warming Response Act (GWRA) established a GHG emissions reduction program designed to limit the level of statewide GHG emissions: (i) to the 1990 level or below by 2020 and (ii) to 80% below the 2006 level by the year 2050.⁴ The state was also authorized to participate in the Regional Greenhouse Gas Initiative (RGGI), a regional cap-and-trade program for power plants.⁵

The Christie administration (2010–2018) sent out mixed messages when it came to global warming. While Gov. Chris Christie acknowledged that climate change was real in 2011, he withdrew the state from RGGI and proceeded to slash the New Jersey Department of Environmental Protection's (DEP) budget and staffing levels.

In contrast, Gov. Phil Murphy and his administration have been unequivocal when it came to climate change and the

need to vigorously address it. Shortly after assuming office, he initiated the steps for the state to rejoin RGGI. The governor's commitment has also been reflected in numerous executive orders and administrative actions taken by the DEP during his first term.⁶

The Legislature has bolstered the executive branch efforts in a series of global warming-related initiatives spearheaded by Sen. Bob Smith (D-Middlesex), the highly respected chair of the Senate's Environment and Energy Committee. These included the 2019 GWRA amendments that required DEP to adopt rules "establishing a greenhouse gas emissions monitoring and reporting program to monitor and report Statewide greenhouse gas emissions" and "establishing interim benchmarks necessary to achieve the 2050 limit and measures necessary to achieve the 2050 limit and the established interim benchmarks."

On Nov. 10, 2021, just eight days after winning a second term, Murphy issued Executive Order No. 274 that directly addressed and fast-tracked the interim benchmark issue. According to that proclamation, the state's policy will be directed to reducing GHG emissions to 50% below 2006 levels by the year 2030.

Renewable Energy

The promotion of renewable energy sources is a key strategy for reducing GHG emissions and its contribution to global warming. As noted in DEP's *2020 New Jersey Global Warming Response Act 80x50 Report*, achieving the desired GHG reduction requires a variety of legislative, regulatory and policy initiatives. Two of these—solar and wind—have particular relevance for the state's farmers and fishers.

Even the casual motorist driving through the state's rural areas has the chance to view a proliferation of solar panels that have sprouted up in farm fields and on farm buildings. In 2021, the Legislature adopted two solar energy measures that have direct implications for agriculture.

The first concerned dual-use solar (DUS) energy. These projects provide for active agricultural use and solar energy generation to coexist on the same property.⁷

The statute directed the Board of Public Utilities (BPU) in consultation with the Secretary of Agriculture to establish a pilot program to permit the construction, installation, and operation of DUS projects but only on unpreserved farmland. It also discouraged their placement on prime agricultural soils or soils of statewide importance located in Agricultural Development Areas, the Pinelands preservation and forest areas, freshwater or coastal wetlands, and the Highlands.

The siting controversy was addressed by the Legislature in the SREC-II enactment.⁸ It established siting criteria for solar facilities in excess of five megawatts. The siting of these facilities on prime agricultural soils or soils of statewide importance located in Agricultural Development Areas was capped at a statewide threshold of 2.5% of such soils. Waivers to exceed the cap could be sought from the BPU, but in no event could the projects approved by the board occupy more than 5% of the unpreserved land containing prime agricultural soils and soils of statewide importance.

As for offshore wind energy, New Jersey's government is all in. This is reflected in executive branch actions and in the approval of the Offshore Wind Economic Development Act in 2010.⁹ It established an offshore wind renewable energy certificate program and authorized tax credits for qualified wind energy facilities. In 2021, the statute was amended to enable certain offshore wind projects to construct power lines and obtain real property interests.¹⁰

Not everyone is convinced that the placement of wind farms in prime fishing areas will be a panacea. The commercial and recreational fishing industry accounts for billions of dollars in annual sales and thousands of jobs. Its representatives have questioned the location and

extent of the lease areas, the number of turbines and the placement of high-voltage cables in the seabed. Those objections have not gained traction with government decisionmakers. It appears that the fishing and offshore wind advocates are on a collision course and at some point, their disputes may be litigated.

Conclusion

New Jersey's agricultural community has a substantial stake in climate change and renewable energy. With respect to climate change, the essential questions are how effective the various governmental responses and the adaptive methods used by the New Jersey farmers will be in responding to the challenges. A critical issue for renewable energy will be how to implement solar and offshore wind initiatives while minimizing unintended negative impacts. ■

Endnotes

1. See Farmland Preservation Bond Act of 1981, P.L. 1981, c. 276 and Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 *et seq.*
2. Rutgers, New Jersey Climate Change Resource Center, "Farming, Food, and Climate Change In New Jersey," p. 2.
3. "Farm Bureau Applauds Senate Passage of Growing Climate Solutions Act," American Farm Bureau Federation Newsroom, June 24, 2021.
4. N.J.S.A. 26:2C-37 *et seq.*
5. N.J.S.A. 26:2C-45
6. For additional information concerning DEP's climate change program, see nj.gov/dep/climatechange/index.html.
7. N.J.S.A. 48:3-87.13 *et als.*
8. N.J.S.A. 48:3-114 *et al.*
9. N.J.S.A. 48:3-51 *et al.*
10. N.J.S.A. 48:3-87.1.

NJSBA PRACTICEHQ

The New Jersey State Bar Association's Practice HQ is a free member resource designed to help you build and maintain a successful, thriving legal practice.

Visit njsba.com to find checklists, whitepapers, videos, and other resources available to you as a member of the NJSBA.

Find information on topics such as:



OPENING OR CLOSING A LAW FIRM

There's a lot to know about opening or closing a law practice. Where do you start? The materials in this section start you down the right path and make sure vital considerations aren't overlooked.



CLIENT DEVELOPMENT

The success of your law practice relies on pleasing clients. But, before you can please clients, you have to obtain them. Learn how to find and retain satisfied clients.



DOCUMENTS

Learn how to effectively and securely draft, edit, share, and collaborate on electronic documents.



TECHNOLOGY

Review the fundamentals you should consider to figure out your organization's needs.



MONEY

Billing by the hour means that your supply of "product" is limited by the clock and calendar. Examine the resources provided to build a profitable practice.



MANAGEMENT

The best-run legal organizations embody a positive, growth-oriented culture, and entails fostering your organization's most valuable asset—your people.



COMPARISON CHARTS

Do you know which password manager, web meeting service, or encrypted email service is best for your business? We can help you figure that out.



LEARNING LIBRARY

Free resources for NJSBA members.

Visit njsba.com



Commentary

Just Look Up

How New Jersey's Legislature is Responding to the Very Real Threat of Climate Change

By Sen. Bob Smith, Joseph Gurrentz and Matthew Peterson

Often, when we read about climate change, we are inundated with messages about its catastrophic global impacts, like melting glaciers, ocean acidification, and more frequent and intense storms; however, too little is shared on specific regional impacts and what has been done to combat them.

With our 130 miles of coastline and many low-lying inland waterways, New Jersey is particularly vulnerable to sea level rise, flooding events, and saltwater intrusion. As highlighted in the New Jersey Department of Environmental Protection's 2020 Scientific Report on Climate Change, rising temperatures will increase droughts, strain the state's freshwater supply, and decrease the productivity of important food crops that make New Jersey the "Garden State."¹

Each of these climate impacts can have broad ramifications on our economy, the natural environment, and our way of life. Anyone who was impacted by Hurricane Sandy or Ida, for example, knows too well how high winds and heavy precipitation can result in road closures, sodden homes, power outages, and coastline damage. What's less evi-

dent is how much weather and climate disasters impact our economy, decreasing property values and requiring costly, taxpayer funded remediation efforts. Unfortunately, the frequency of billion-dollar weather and climate disasters is increasing.

In a recent report, the Union of Concerned Scientists found that New Jersey will lead the nation in the number of commercial properties at risk of chronic inundation in 2045, and will be second only to Florida in the number of residential properties at risk.² The U.S. Army Corps of Engineers projects that New Jersey's back bay communities could face a combined average of \$1.8 billion a year in damages if additional steps aren't taken to mitigate and respond to climate impacts.³ Other recent research has found that sea level rise-driven changes in tidal flooding have already reduced home values in New Jersey by an estimated \$4.5 billion.⁴ Voila: the true cost of doing nothing.

Aggressive action is necessary to reduce our dependence on fossil fuels to help avoid the worst effects of climate change. While some may argue that climate change is too big and too expensive an issue for any one state to meaningfully address, we have a moral obligation to

do so. We can get to net-zero greenhouse gas emissions, and we can do so feasibly and affordably. In fact, Princeton University's Net-Zero America study shows that the nation will return value on coordinated climate action.⁵ At the end of the day, if New Jersey does not lead the way, who will?

Despite our state's small geographic size and relatively small contribution to total global emissions of greenhouse gases, our Legislature's actions—and omissions—have ramifications that extend beyond the state's borders. Our climate policies signal to carbon-intensive industry sectors, surrounding states, and the federal government that they need to prepare for a decarbonized future.

Powering the Future with Carbon-Free Electricity

Since the passage of the Global Warming Response Act in 2007, New Jersey has successfully reduced greenhouse gas emissions by 20% below 2006 levels.⁶ This is a huge win, but a coordinated, economy-wide transformation will be required to achieve our more ambitious goals: 100% carbon-free electricity and an 80% reduction in carbon emissions by 2050.

To achieve this transformation, the Legislature is working from a variety of angles. Some of the Legislature's actions include decarbonizing the state's electrical grid, transitioning to electric vehicles, and guiding market forces to incentivize the use of products that use innovative, low-carbon manufacturing processes.

On the energy front, New Jersey's Renewable Portfolio Standard (RPS) is one of the most aggressive in the nation. The RPS, established in 1999 and updated in the Clean Energy Act of 2018, requires New Jersey electricity suppliers to procure 22.5% of electricity sold in-state from qualified renewable energy resources. This requirement increases to 35% in 2025, and 50% by 2030. On top of that, New Jersey's Energy Master Plan calls for 100% clean energy by 2050. To meet these goals, the Legislature has developed several incentives programs to spur the deployment of clean energy resources.

The Solar Renewable Energy Certificate (SREC) program, for example, has accelerated the deployment of solar energy installations. Solar now accounts for more than 5% of New Jersey's total retail electricity consumption, and we are aiming to double that by 2026. This past summer, the Legislature authorized the Successor Solar Incentive (SuSI) program, which includes a competitive solicitation process for at least 1,500 MW of large, grid-scale solar facilities. The Legislature also established the Dual-Use Solar Energy Pilot Program to authorize co-production of solar energy and crops on unpreserved farmland.

The state has also sought to harness the incredible power of our offshore wind by approving over 3,700 MW of new offshore wind energy projects, enough to power roughly 1.15 million homes. With construction having recently begun on the massive wind port in Salem County and the Paulsboro Marine Terminal in Gloucester County, our offshore wind capacity is only

expected to increase, eventually surpassing the state's goal of 7,500 MW by 2035 while creating high-paying jobs and stimulating the local economy.

Finally, we can't ignore the importance of nuclear power plants in facilitating the decarbonization of the state's electrical grid. Three nuclear power facilities provide New Jersey with approximately 42% of our electricity, and roughly 90% of our total carbon-free energy.⁷ The continued operation of these plants is critical if we are going to keep our carbon footprint low while transitioning to a more reliable, renewable energy grid. In 2018, the Legislature established a zero emissions credit (ZEC) program to compensate the state's nuclear energy facilities for the full value of the carbon-free electricity they provide. Additionally, the state should explore the feasibility of incorporating next generation, small modular reactors to increase resilience and the diversity our clean energy portfolio.

So far, about 50% of New Jersey's in-state electricity production comes from emissions-free sources. Thanks to the state's aggressive climate policies, that number is primed to increase. While this is a big accomplishment, there is still much more to be done.

Cleaning up the Transportation Sector

The single largest source of greenhouse gas emissions in the state is the transportation sector, which accounts for 40% of total statewide emissions. The Legislature has taken several meaningful steps toward decreasing transportation emissions; including enacting the extremely successful light-duty electric vehicle incentives program, requiring electric vehicle charging stations in new construction, and using RGGI proceeds to electrify public transportation and build out the state's EV charging infrastructure. Still, more aggressive action is needed if we are going to clean up our transportation sector in a substantial,

lasting way.

One meaningful way in which the Legislature can decrease transportation emissions is through the electrification of public transit. This is a public health and an environmental justice priority. Urban centers are often the most dependent on public transport while being disproportionately impacted by the negative health effects of toxic air pollution from combustion engines.

Unfortunately, air pollution is endemic across the entire state. To address the broader issue of transportation emissions, the Legislature has its eyes set on the lowest hanging fruit: New Jersey's medium- and heavy-duty vehicles. These account for only 4% of vehicles on the road while generating approximately 25% of transportation greenhouse gas emissions.⁸ The Department of Environmental Protection is implementing the Advanced Clean Trucks Rule, which will increase the proportion of electric medium- and heavy-duty vehicles sold in the state. Additional legislation could further incentivize the conversion of commercial automobile fleets to zero emissions vehicles.

What Comes Next

Moving forward, we need to shift the way the state conducts business by considering more seriously the costs associated with climate change impacts. If the state intends to meaningfully address climate change, we must "practice what we preach." We cannot continue to tout our commitment to environmental protection while simultaneously perpetuating, and profiting off of, the actions of climate-polluting industries.

To this end, last session, Sen. Bob Smith introduced S330, which would prohibit the state pension fund (valued at over \$76 billion) from investing in 200 of the largest publicly traded fossil fuel companies. He also cosponsored SCR18, which would prohibit the construction of new fossil fuel power plants, thus

requiring retiring fossil fuel plants to be replaced with renewable energy generation. For now at least, renewables remain our least expensive and least polluting energy resources, so it makes environmental and fiscal sense to support them.

Of course, these policies don't constitute an exhaustive list. We are continuing to work on measures to mitigate the effects of climate change and aid the transition to a zero-emission future. These include programs that would incentivize the deployment of energy storage systems, streamline the interconnection of renewables to the electricity grid, establish an electric school bus fleet conversion grant program, and more. This session, the Senate Environment and Energy Committee will take testimony at each meeting from interested stakeholders on what more the state can do.

Climate change may be the single greatest threat we face this generation. Not "looking up" and "sit back and reassess" is not acceptable in New Jersey. ■

MATTHEW PETERSON is General Counsel to the Senate Majority Office. He previously served as Aide to the Senate Environment and Energy Committee, both for the Senate Democrats and the non-partisan Office of Legislative Services. Matt earned his J.D. from Boston College Law School and his B.A. from Rutgers University.

SEN. BOB SMITH represents the citizens of New Jersey's 17th Legislative District. Having served in the state Legislature since 1986, he is chair of the Senate Environment & Energy Committee.

JOSEPH GURRENTZ is an experienced scientist and educator with a Ph.D. in chemistry on novel semiconductor materials for solar power generation and energy storage. Joseph (Joey) is an Eagleton Science & Politics Fellow and co-aide to Senate Environment and Energy Committee.

Endnotes

1. See Press Release entitled "New Scientific Report Details Climate Change Impacts On New Jersey, Supports Murphy Administration Efforts To Protect The State's Environmental, Public And Economic Health" available at nj.gov/dep/newsrel/2020/20_0033.htm

m (visited March 23, 2022).

2. See Press Release entitled "New Study Finds 251,000 New Jersey Homes Worth \$107 Billion will be at Risk from Tidal Flooding" available at ucsusa.org/about/news/accelerating-sea-level-rise-lower-48-states-projected-worsen-tidal-flooding-putting-many (visited March 23, 2022).
3. See Press Release entitled "Army Corps releases draft report for New Jersey Back Bays study" available at nap.usace.army.mil/Media/News-Releases/Article/2738123/army-corps-releases-draft-report-for-new-jersey-back-bays-study/ (visited March 23, 2022).
4. See Press Release entitled "State by State Analysis: Property Value Loss from Sea Level Rise" available at firststreet.org/press/property-value-loss-from-sea-level-rise-state-by-state-analysis/ (visited March 23, 2022).
5. See Press Release entitled "Getting U.S. to net-zero emissions by 2050 will take massive, but affordable, coordination" available at environment.princeton.edu/news/net-zero-emissions-by-2050/ (visited March 23, 2022).
6. Barr, H., Orlando, P., Kettig, R., Barry, R. C., Karmarkar-Deshmukh, R., & Kamel, M. (2020). *New Jersey's Global Warming Response Act 80x50 Report*. New Jersey Department of Environmental Protection. Trenton, NJ.
7. U.S. EIA, State Energy Profile Analysis, New Jersey, available at eia.gov/state/analysis.php?sid=NJ (visited March 24, 2022).
8. See Press Release entitled "DEP Commissioner LaTourette Announces Adoption of Clean Truck Rules, Setting New Jersey on Path for Zero-Emission Vehicle Future" available at nj.gov/dep/newsrel/2021/21_0043.htm#:~:text=While%20medium%20and%20heavy%2Dduty,5. (visited March 24, 2022).

NJSBA CAREERHQ

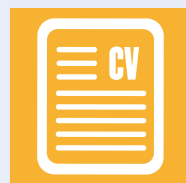
The New Jersey State Bar Association, the state's largest organization of judges, lawyers and other legal professionals, is the go-to source for finding your next career opportunity.

The NJSBA is committed to helping the legal profession as we continue to navigate the pandemic.



**FIND
A JOB**

NJSBA members can apply
for open positions for FREE.



**POST
A JOB**

Job openings are advertised to
the NJSBA's 18,000+ members.
All listings are for 30 days.

Visit **njsba.com**
to find or post a job



Legal Malpractice Insurance Premiums Are Shocking New Jersey Law Firms

We can help! Just ask any of the over 1400 New Jersey law firms who already entrust us with their legal malpractice coverage.

Garden State Professional Insurance Agency is the exclusive agent in NJ for the largest legal malpractice insurer in the country and we represent many other insurers rated *Superior & Excellent*. We also have good homes for firms with less-than-perfect claim records or difficult areas of practice.

Looking for other coverages for your firm? We provide Cyber Liability and Employment Practices coverage also!

Contact us for a no obligation consultation and premium estimate.

800-548-1063
info@gsagency.com
www.gsatency.com



NJSBA

2022
Mid-Year Meeting

KEY WEST

November 6-10
Casa Marina Key West

REGISTER TODAY
NJSBA.COM

