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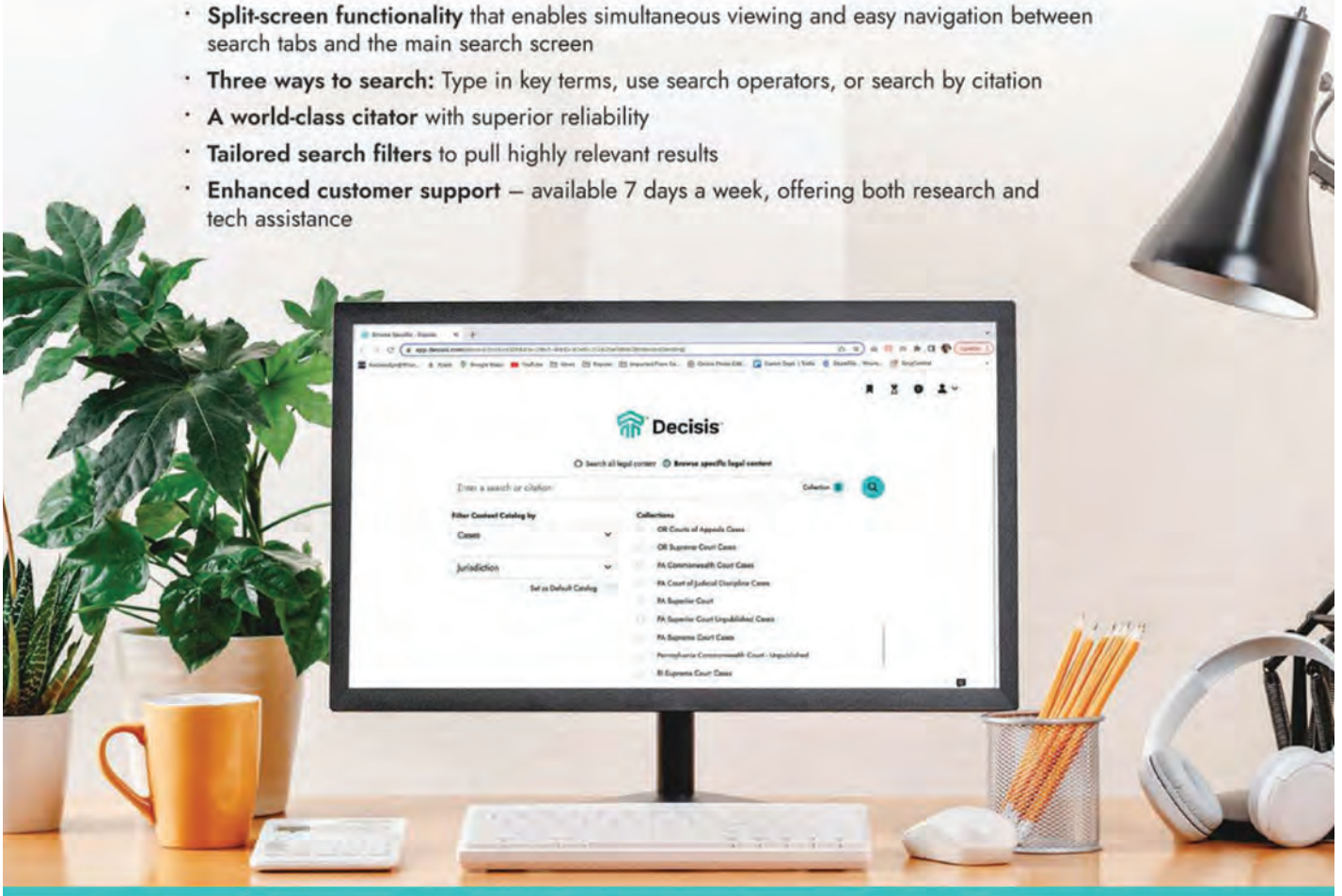

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June 2024 No. 348

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In this Issue: **Environmental Law**

Page 12

Page 28

Page 32

Page 34

Continued

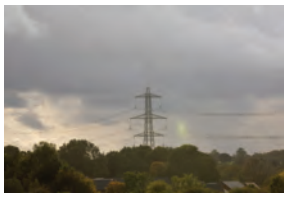
NEW JERSEY LAWYER

June 2024 No. 348

Continued from page 3

DEPARTMENTS

Page 42



Page 48

Page 8

WILLIAM H. MERGNER JR.

Leading With a Steady Hand

Editor's note: William H. Mergner Jr. was installed as the 126th president of the New Jersey State Bar Association at the Annual Meeting and Convention on May 16 in Atlantic City. This is an excerpt of his installation speech. It has been edited for brevity and clarity.

It is the greatest privilege of my professional life to serve as president of the New Jersey State Bar Association. From humble origins in 1899, with only 15 trustees and seven committees, the Association has evolved into the institution it is today through generations of service around the belief that our profession is never stronger than when attorneys speak with a unified voice. With upwards of 16,000 members, the Association is the largest and most indispensable advocate for attorneys, judges, paralegals, clerks and law students in New Jersey.

During the past five years, the legal profession has undergone a greater transformation than it had in the last 50. Beginning with the pandemic in 2020 through to the judicial vacancy crisis in 2023, lawyers, judges and litigants have lived through many challenges and changes to the way we serve our clients and the public. That has only increased the pressure on the justice system and on the lawyers and judges essential to its function. This pressure continues today as vacancies remain high while those in power have declared the crisis is over. Simultaneously, a new judicial crisis may emerge.

In recent weeks, the Association learned the state Senate is considering a constitutional amendment that would shift control of Appellate Division appointments to the Governor and Senate – an authority that, with good reason, is constitutionally granted to the Chief Justice. The damage that would result from such an amendment is immeasurable. It would threaten the independence of the Judiciary, further expose the courts to the political process and likely create a vacancy crisis in the Appellate Division, which does not exist now. I want to be clear that the Association firmly opposes this proposal and will remain the Judiciary's strongest advocate in promoting its independence and essential role as a co-equal branch of government.

The current process for appointing appellate judges is nonpolitical, is based on merit and experience, and there is a tryout before you are elevated. Also, there has been zero public outcry regarding the quality of our appellate court.

Contrast that with the struggles we have witnessed to fill vacancies in both the Superior Court and Supreme Court under the leadership of the same people who now want to bring this process to our intermediate appellate court.

The suggestion that we should change the selection process seems to have less to do with whether the process works and more to do with who should have the power to control the process. The NJSBA urges those who are involved in this struggle to engage in a thoughtful dialogue to ensure that the current system remains in place. This is a unique moment in the history of our democracy and the legacy of the courts in New Jersey, which are considered among the best in the country. The legacy of those involved in the process will be written in large part based upon how this issue is resolved. The NJSBA supports the current selection process for Appellate Division

Continued on page 7

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FROM THE SPECIAL EDITOR

New Jersey and the Environment: Looking Forward

The last issue of *New Jersey Lawyer* magazine dedicated to environmental law was published nearly eight years ago. This issue presents a ripe opportunity to reflect on the growth of the practice and the critical environmental issues affecting New Jersey citizens since that time. There has been a significant shift and focus on climate change, sustainability, and environmental justice, as well as sweeping developments regarding emerging contaminants and natural resource damage claims that affect many stakeholders. This issue explores these and other key topics that impact not only environmental practitioners, but all members of the Bar.

We are honored to have a deep bench of state leaders and lawyers who have contributed to this issue. New Jersey Department of Environmental Protection Commissioner Shawn M. LaTourette opens the issue with a discussion regarding "The Urgency of New Jersey's Climate Reality." The issue concludes with insightful commentary from state Sen. Bob Smith, Dr. Joseph Gurrentz, and Dr. Celia Smits titled "Navigating the Winds of Change: New Jersey's Winding Path Toward Clean Air and a Stable Climate."

Between these thoughtful bookends are articles from colleagues across the state, including a discussion of greenwashing claims (by Melissa A. Clarke and Andrea A. Lipuma); the growth of offshore aquaculture (by Zachary A. Klein); state guidance encouraging the implementation of green, sustainable and resilient remediation techniques (by Andrew T. Alessandro); natural resource damages enforcement efforts (by Vinita Banthia, Matt Conley and Dan Farino); due diligence discussion (by David Restaino); and broadening PFAS regulation and legislation (by Dawn Monsen Lamparello, B. David Naidu, and Emily M. Poniatowski).

We thank the contributors to this magazine for their dedication and insight and are confident this issue will be a useful reference guide to New Jersey practitioners for years to come. ■

DAWN MONSEN LAMPARELLO *is a partner at K&L Gates LLP in the firm's Newark office. She is a member of the Environment, Land, and Natural Resources practice group. Dawn is an officer of the Environmental Law Section and a fellow of the American College of Environmental Lawyers.*

Continued from page 5

judges, one that has been in place for 75 years, and will continue to engage stakeholders and decision-makers to preserve that system.

We have also spoken about the NJSBA's advocacy and initiatives on attorney wellness and mental health. We are gratified to see that the Supreme Court has seen the results of the surveys evidencing the mental health crisis facing lawyers. We are appreciative of the Court scheduling listening sessions around the state during in which many of the same sentiments were expressed, along with specifics examples of how the court system functions, at times, in a manner that exacerbates those pressures. We are optimistic that the Court is listening.

The NJSBA also recognizes that with the end of the pandemic, influx of judges and the backlog of cases in our system, the Court has developed broad guidelines seeking to reduce that backlog substantially over the next three years. Those guidelines place great discretion in the hands of judges, who have also been burdened with the task of moving cases while short staffed. The NJSBA is not here to challenge the Court's authority to implement changes to help reduce the backlog. Instead, we challenge the Court to use that authority in a manner that tells lawyers that you weren't just listening, but that you heard us.

The crisis is real and the stakes are high. We have always been appreciative of the Court's willingness to have a dialogue on issues that impact lawyers, and hope that through continued dialogue we can find solutions that tell lawyers that their mental health is a priority.

The NJSBA has been and will continue to be a relentless and effective advocate on the important issues affecting our members, their clients, the profession and the judicial system. Two issues that we will be laser focused on this year is the impact of artificial intelligence on the practice of law, which has been a significant focus of this year's convention, and non-attorneys effectively practicing law and owning law firms, which is being allowed in some western states.

In the next year, I pledge to further the Association's review of the complex legal and ethical questions raised by AI and how attorneys can best use the technology to their advantage. We will look to a recent report by the NJSBA's Task Force on Artificial Intelligence in the Law as a guide on how to address these issues. We will advocate for a profession that balances how AI can help attorneys deliver legal services while protecting the essential role they play in the law and society.

On the subject of who should perform legal services, non-lawyers practicing law and owning law firms is a trend the Association should always stand firmly against. All around the country, we are witnessing the persistent threat of law practices being taken over by wealth-management and big accounting firms, private-equity ventures and other financial institutions. Licensing non-lawyer entities that offer services in business law, taxes, and estate planning, legal chatbots, notarios—these are all troubling developments that threaten the role lawyers play as officers of the court, independent and free from the influence of those who would compromise our ethics for the sake of profit.

During my tenure, the NJSBA will continue to be a national leader in the fight against the proliferation of non-lawyer legal service providers and non-lawyer-owned law firms. I pledge to continue this important work to ensure the practice of law is always driven by lawyers.

I cannot emphasize enough the influence our Association has when our members are engaged. As we all know, when the state bar mobilizes around a cause, we can speak powerfully on the issues that face our profession. That strength also comes from numbers. This year, I encourage everyone who can attest to the benefits of your membership to pay it forward and spread the word among your colleagues and friends, as I pledge to do. With a vibrant and dedicated membership, we can sustain the Association and its mission for decades to come. The issues we that are facing as lawyers, including those we have discussed tonight, matter to you and are critical to the future of the legal profession we all love.

In the year ahead, I intend to make myself as accessible as possible to our members. If you have any questions, suggestions or concerns, my door is always open. I am here to listen and do everything I can to help.

I hope to see you around the New Jersey Law Center throughout the year for our many events, and maybe even in Dublin this fall. ■

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PRACTICE TIPS

WORKING WELL

Just Breathe, Counselor

By Lori Ann Buza
KSBranigan Law, P.C.
Rutgers Law School Well-Being Professor

A great way to destress from the pressures of the law profession is to practice breathing exercises. Not only can breathing exercises help manage stress, but they may also improve one's overall health, reduce muscle tension, pain, and symptoms of anxiety and depression.

Indeed, studies have shown a neurological link between respiration and focus, and that the daily practice of breathing techniques produces optimal levels of noradrenaline in the brain and heightened ability to focus. Further, depending on the type of breathing technique used, different exercises may increase a person's energy or provide relaxation. Breathing techniques can also serve as a part of a meditation practice, help to ground the mind, and allow for growth in areas of creativity, expression, and learning.

For thousands of years, martial artists, yogis and certain cultures and religions have practiced breathing techniques for the strength of both body and mind. Breathing is the energy behind our movement, posture, strength, balance, and control—that if properly used can enhance multiple aspects of a person's life.

You can practice these exercises just about anywhere—including in the office, the courthouse, home, park, on transportation or even in a parked car between stressful appointments! Anchoring a breathing exercise to a well-established habit can help make it part of a person's everyday routine. For example, you can attach a breathing routine to a morning or evening ritual (e.g. after each time you shower, include a five-minute breathing routine).

There are several techniques available; just a few favorites are explained below. If you enjoy these and find them beneficial, start exploring more extensive breathing work with an instructor and learn to combine them with daily stretching and meditation. (Be sure to check with your doctor before starting any new exercise routine or breathing technique.)

Keep in mind that deep breathing provides more oxygen and greater lung capacity as opposed to being trapped in shallow breathing. There is chest breathing, which we use typically during exertion, stressful moments and exercise; and diaphragmatic breathing (also known as belly breathing) which is more effective for relaxation and repair.

Belly Breathing

Belly breathing is excellent for inducing relaxation. This is focused abdominal breathing that allows for deeper and productive breathing. Simply inhale deeply and allow your belly to expand, then exhale and allow your belly to deflate.

The best way to understand what you are doing is to lie down on your back on the floor and place one hand on your chest, the other on your belly. Inhale deeply and consciously choose to push the hand on your belly up and down with each breath, rather than the hand on your chest. Adjust as necessary to ensure the correct hand (the one on your belly) is rising and falling so that you are using your diaphragm to breathe most deeply.

Once you understand these mechanics, you can belly breathe from a seated or even standing position. This type of breathing not only reduces stress and enhances calmness, but it increases

the oxygen supply to your brain, decreases heart rate and muscle tension, stimulates the nervous system, and strengthens the supporting ligaments of your diaphragm.

Simple Counting Breaths

There are numerous ways you can use the practice of counting breaths to help with stress or increase energy. As lawyers, our minds are very likely to wander to work, so providing a count to each breath helps counteract that by providing a focus to what we are doing. For instance, you may choose to do a simple 10 count—inhaling on the odd numbers, exhaling on the even numbers. Try to repeat that sequence 10 times, or you may set a timer.

Do not worry about the length of breath or anything other than staying still and breathing deeply and consistently, like a clock to a count. Another option is to count up to 10, then reverse the count from 10 back to one. After a few times of this, you should feel refreshed and ready to be more present, productive and focused.

Box Breathing

Box breathing is helpful to quickly relax during a particularly stressful moment. It is also a type of counting deep breathing exercise that calms the nervous system by slowing down the heart and allowing the CO2 to build up in the blood and produce a feeling of calm.

Here's how to do it: Inhale slowly for four seconds, hold in the breath for four seconds, exhale slowly for four seconds, hold for four seconds, and repeat the process—creating a box of sorts.

You may do this same sequence with five or six seconds as well should you have the capacity to. Just be sure to keep the number the same for all four parts of the sequence. 4-4-4-4 or 5-5-5-5, etc.

One-to-Two Ratio Breathing

Another good option is the one-to-two ratio of counting breaths. With this technique, exhale for twice as long as you inhale. Try inhaling for four to five seconds, and then exhale slowly for 8 to 10 seconds. Select the number your body is comfortable with but feel the most benefit from. It is so important to fully empty the lungs before replenishing it with each next breath.

This form of counting and regulating your breaths is a form of pranayama, used in yoga. It helps reduce anxiety and provide calmness; it's a great thing to do right before sleep.

Pursed Lip Breathing

The American Lung Association supports the pursed lip breathing technique for improved heart function and to help make one's lungs more efficacious. It is especially good during times of shortness of breath, as it is designed to rid the lungs of accumulated stale air, increase oxygen levels and help the diaphragm to more efficient breathing. It is particularly good for people suffering from asthma and other chronic lung conditions.

The pursed lip technique reduces the number of breaths one takes and keeps the airways open longer so that more air can flow in and out of the lungs. Similar to ratio breathing, with this technique breathe in through your nose and breathe out at least twice as long through your mouth—but do so with pursed (or puckered) lips. The pursed lips help one to extend the length of the exhalation.

Alternate Nostril Breathing

This form of breathing can increase your energy as well as calm you. Also known as Nadi Shodhana, this practice involves alternating the breath entering your body from each nostril. With this method, sit up tall and with good posture. First, place your finger over your right nostril and inhale through the left nostril. Second, close the left nostril with a finger and exhale through the right nostril. Then inhale through the right nostril, close it with your finger and exhale through the left nostril. Continue doing this switch of nostrils for each inhale and exhale. Be sure to fully inflate and expand the lungs during each breath.

The reasoning in yoga behind this method is to balance the right and left sides of the brain and produce a more stable, pure state of mind.

Bellows Breath

Another breathing technique to promote increased energy is known as bellows breath. Also known as the "breath of fire" in yoga, it is one of the more challenging breathing exercises. This form of breathing stimulates the diaphragm, clarifies the mind, and energizes the body. Breathing masters describe it as the way to "clear away the clouds." From a seated position, with a long, tall spine—this technique requires one to take quick, short breaths inhaling and exhaling vigorously for 10–15 seconds. Then one would take a 15–30 second break while breathing normally. This would be repeated several times.

Because this technique helps with energy, it is recommended to practice this one first thing in the morning.

Breathe In...Breathe Out...

Our breath is something that carries us through every moment of every day; we inhale between approximately 10–20 times a minute and 15,000–30,000 a day! Why not take an opportunity to use your breath for greater health, productivity, and focus? With the high stresses of the legal profession, it is paramount attorneys find ways to manage their well-being. Next time you are faced with a difficult situation or stressful work environment, perhaps it's time to pause and take a breath...■

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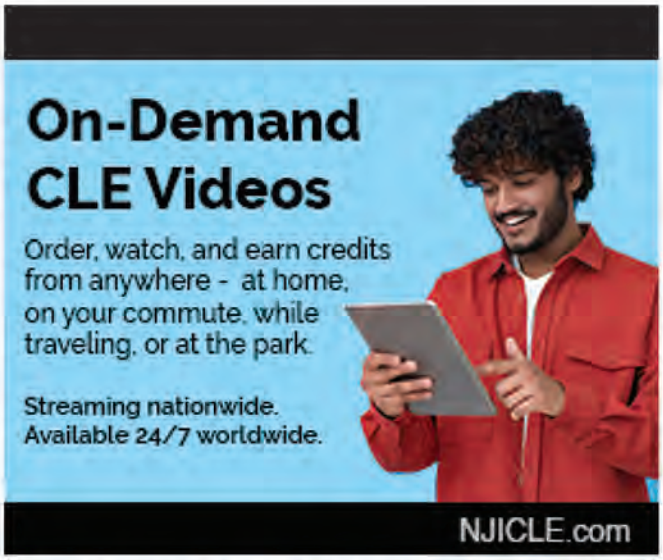

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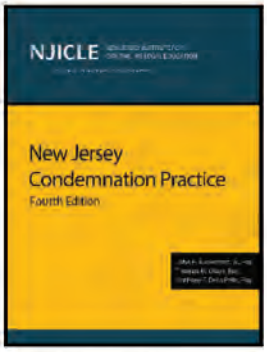
Environmental Law: Treatise



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New Jersey Condemnation Practice (2023)

Authors Include: John H. Buonocore, Esq.; Thomas M. Olson, Esq.; Anthony F. Della Pelle, Esq.

This completely updated manual features a wealth of information on every aspect of condemnation practice, focusing on the tools you need to handle a condemnation case, plus a variety of useful forms.

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The Urgency of New Jersey's Climate Reality

By Shawn M. LaTourette

Climate change is the single greatest long-term threat to our communities, economies, and way of life in New Jersey. The existing physical impacts of climate change and the gravely necessary efforts to reduce climate pollution touch every sector of our society and economy and, thereby, every area of legal practice. Had you been thinking of climate as an issue for the environmental lawyers, consider it one for every lawyer, and especially those engaged in the transfer, financing, development, or use of land or water resources vulnerable to climate impacts (spoiler alert: every resource, everywhere, has some level of climate vulnerability).

A quick primer: the most recent and legitimate scientific explorations on the international, national, and state levels all agree, in no uncertain terms, that climate change is happening now and that its effects will continue to worsen due to the greenhouse gases humankind has already emitted and continues to emit into the atmosphere. In New Jersey specifically, temperatures are increasing, sea levels are rising, flooding is increasing, and extreme weather is becoming more frequent and intense. As a matter of degree, these risks are more severe and projected to worsen at a faster rate in the Garden State as compared to global averages and among our regional counterparts. Read all about why and how in the *New Jersey Scientific Report on Climate Change*, which is routinely supplemented with new scientific information.[1]

Climate Action: It's About More than Reducing Emissions

If we are to avoid the most catastrophic impacts of climate change, we must make faster and deeper reductions in our emissions of climate pollutants. This means embracing a rapid transformation of our energy markets, enabling our modes of production to become carbon neutral, our homes and businesses energy efficient, and our cars zero-emission, our economy more circular and less wasteful, and so much more. In New Jersey, the Global Warming Response Act (GWRA) sets the goal for reducing climate pollution by 2050, and the pathways for doing so in each of our emission sectors are prescribed in GWRA reports delivered to the state Legislature.[2] Another such report is on the horizon later this year.

As we stand proud of the strides that New Jersey has made in reducing emissions and freely acknowledge that much more drastic reductions are an existential necessity, we must also be honest about the reality of our changing climate notwithstanding these mitigation efforts. And the truth is this: because of our past and continuing unabated emissions, the climate risks facing New Jersey will only worsen in the years ahead, with devastating impacts to our communities, economy, public health, and the daily lives of our residents if we are not better prepared to navigate this new reality. This means that, in addition to reducing emissions, we must act with concerted urgency to ensure our communities adapt to the impacts of climate change that we cannot abate—at every level of government, across the full panoply of our businesses and institutions.

New Jersey's Changing Climate in Context

Let us put some recent conditions in recent context. 2023 was the hottest year on record since we began tracking in 1850. This article goes to press just a few months after excessive December rains deluged communities in northeastern New Jersey amid a continued year-over-year snow drought. In 2022, we were in a drought watch for much of the year. We saw some of the largest New Jersey wildfires in nearly a decade. A 9-mile-long harmful algal bloom infected the Millstone River, endangering one of the most critical drinking water supply intakes in Central Jersey. In 2021, the remnants of Tropical Storm Ida decimated many inland areas and took the lives of 30 of our New Jersey neighbors.

This year, 2024, we are expecting another above-average hurricane season.

These alarming conditions are precisely what climate scientists have been projecting and warning policymakers about. New Jersey's changing climate is forcing residents and businesses to grapple with a world of worsening extremes: periods of incredibly hot, dry conditions that stress our water supplies, crop yield, and public health, situated between periods of frequent and intense rainfalls that overwhelm our aging and undersized infrastructure, causing extreme flooding, destroying property, and costing lives.

We are not yet ready. But, empowered by sound science and a willingness to make wise changes, we can get ready and help our communities, residents, and businesses become more resilient to the continuing climate changes that lie ahead.

Better Protecting Riverine Communities from Increasing Flood Risk

Tropical Storm Ida in 2021 was not an anomaly. It was a continuation of a pattern of worsening climate impacts. Immediately preceding Ida, in August 2021 we had the remnants of Tropical Storm Fred and Tropical Depression Henri, both of which resulted in signifi-

SHAWN M. LATOURETTE, *who has served as New Jersey's Commissioner of Environmental Protection since June 2021, is responsible for formulating statewide environmental policy, while directing programs that protect public health and ensure the quality of New Jerseys air, land and water, and natural and historic resources. A lawyer and policymaker with more than 20 years of experience in environmental protection, Commissioner LaTourette began his career defending victims of toxic exposure, including organizing and advocating for the needs of vulnerable New Jersey communities whose drinking water was contaminated by petrochemicals. A New Jersey native and graduate of Rutgers University and Rutgers Law School, the Commissioner is also an adjunct professor at Rutgers Law School-Camden, where he teaches courses on environmental justice and climate change law and policy.*

cant rainfall throughout the state. And just before those, New Jersey experienced the wettest July since 1975 and second wettest July in almost 50 years, with rain totals averaging 3.44 inches above normal in northern New Jersey and 2.62 inches above normal in the southern counties, according to the state climatologist.

It is hard to forget Ida's staggering rainfall totals, the bulk of which occurred over a six-hour period, causing creeks and rivers to rise and overtop, and overwhelming inadequate stormwater management systems with damaging and tragic results to public health, welfare, and safety across the state. Thirty lives were lost, residents reported injuries, and buildings and infrastructure were severely damaged—some beyond repair. Numerous people were stranded in homes and many businesses were shuttered for extended periods of time. Dangerous flash flooding conditions left motorists stranded in flood waters. Emergency responders risked their lives to protect those threatened by floodwaters. The 30 New Jersey residents lost to Ida, the majority to drowning, made this the state's second deadliest natural disaster in the past century.

Amid these climate realities, every community, business, and landholder would be wise to reflect on the fact that, as of 2019, New Jersey ranked third in the nation in claims paid by the Federal Emergency Management Agency since 1978, with $5.8 billion in total flood insurance claims. However, flood risk extends beyond the boundaries mapped by FEMA, with 38.5% of claims from Henri and 31% of claims from Ida originating outside of the FEMA designated areas. Flood damage is not neatly confined to areas previously understood to be at risk, in part because—until recently—methodologies for determining flood hazard areas and managing stormwater have been inherently backward-looking, the last data point being from 1999 while extreme precipitation as increased markedly since.[3] This has meant that the precipitation data that drives development and infrastructure does not account for either current conditions or the expected impacts of climate change on precipitation events.

We are on our way to fixing this in New Jersey through climate resilience regulatory reforms, but we still have a lot of work to do.

Last year, the Department of Environmental Protection adopted its Inland Flood Protection Rule,[4] an amendment to the State Flood Hazard Area Control Act regulations based on more recent analyses of New Jersey-specific precipitation data confirming that annual and short-duration intense precipitation is increasing across New Jersey and will continue to increase through the end of the century. Since 1999, New Jersey has experienced an increase in precipitation between 2% and 10%, which varies geographically. Projecting forward, the increase will grow from 20% to 50% more precipitation in the coming decades. The Inland Flood Protection Rule will ensure that these realities are properly accounted for in the building and stormwater design standards for new development in fluvial (i.e., riverine) flood hazard areas. This approach not only makes New Jersey a clear leader in climate resilience policy, but a safe bet for continued growth and investment.

Accounting for New Jersey's Unique Risks from Sea Level Rise

Early in his administration, Gov. Phil Murphy recognized that the state must take deliberate action to ensure that climate risks were better understood and reduced. Under Executive Order 100, the governor charged the DEP with updating environmental land use regulations under a reform known as Resilient Environments and Landscapes, or REAL, a component of the Murphy Administration's New Jersey Protecting Against Climate Threats (NJPACT) initiative, which will afford critical protections for our coastal communities. Similar to the Inland Flood Protection Rule, which corrected for obsolete precipitation data in fluvial areas, REAL will correct for the fact that our Coastal Zone Management rules do not account for sea level rise. In the absence of amending these rules, the reconstruction of storm-damaged buildings and infrastructure, as well as new investments in private and public assets, would be constructed to standards that are already outdated and will only become more so as the state's flood risks continue to worsen as a function of anthropogenic sea level rise. This would leave New Jersey residents vulnerable to harm and new investments subject to continued repetitive loss.

Similar to New Jersey's increasing risk of extreme precipitation, sea levels are increasing at a greater rate in New Jersey than most other parts of the world. It is likely that sea level rise will meet or exceed 2.1 feet by 2050 and increase to 5.1 feet by the end of the century. "Sunny-day flooding" will occur more often across the entire coastal area with Atlantic City experiencing "sunny-day flooding" 95 days a year and a 50% chance it will experience 355 days a year by 2100. Increases in sea level rise and storm surge represent a significant additional risk that our residents will face within the life of a typical mortgage. We must ensure that our investments are built to stand the test of time amid a changing climate.

When complete, the REAL rules will help ensure that coastal flood hazard areas are better delineated and that new and reconstructed assets in these areas are designed and constructed using the best available climate-informed sea -level

rise data to adequately protect our assets, economy and, above all, our people from the catastrophic effects of worsening coastal flooding and storm surge.

New Jersey Must Invest in a Network of Climate Resilience Solutions

Even as the state pursues these important regulatory reforms to improve the resilience of new and reconstructed development, we must also recognize that there is no one silver bullet that will protect every community from the increasing risks of climate change, extreme weather, and flooding. There is, however, a network of solutions that, when pursued concertedly, can help ensure the resilience of our communities and economies:

1. **Climate Resilience Planning.** To truly address our resilience needs we must engage in climate resilience planning at the regional and community levels. This requires more planning resources to support the development of community-specific, science-based strategies and actions that will protect homes, businesses, critical infrastructure, and natural resources. Holistic climate resilience planning will enable communities to identify where financial resources are best deployed, including where flood resilience infrastructure, stormwater improvements, or Blue Acres buyouts would be best positioned in a given community.
2. **Engineered and Natural Resilience Infrastructure.** Working with federal partners including the Army Corps of Engineers and Federal Emergency Management Agency, New Jersey must continue to match and facilitate new federal investments in flood control and water infrastructure. In recent years, for example, the federal government recently committed more than $1 billion to the study, design and construction of structural solutions in some of New Jersey's most flood-prone watersheds. And, the three most recent state budgets have included millions more for continued investments in shore protection and flood control projects.

   Yet, these infrastructure projects represent an overall small amount of protection in few places, and they will take many years, even decades to complete, at tremendous cost. We cannot rely on hard flood control infrastructure or beach replenishment alone to meet our climate resilience needs. We need buy-in and participation from each municipality to undertake localized action that best fits the needs of their community. We must also protect and enhance the resilience of our ecological systems, which not only provide us with benefits like reduced flooding, weakened wave force, reduced heat, and carbon absorption, but also provide critical habitat and resources that are vital to the well-being of the state's biodiversity.
3. **Blue Acres Buyouts.** We must continue to support the DEP Blue Acres Buyout Program and ensure that it is used not only as a reactive disaster recovery tool, but proactively to help to get families out of harm's way while creating more storage for increasing flood waters, which can have dual benefits for communities as new parklands or open space.
4. **Modernizing Stormwater and Development Standards.** As discussed, we must ensure that new investments in buildings and infrastructure will stand the test of time and a changing climate by modernizing design standards such as those identified by the Inland Flood Protection and REAL rules. In addition, consistent, ongoing investment in right-sizing stormwater infrastructure will ensure that communities withstand the bigger storms of today and tomorrow. This includes the adoption of stormwater utilities, building green infrastructure, enhancing existing infrastructure, and restoring riparian areas.

In short, the resilience menu is large, and we must invest in each course.

Through climate resilience planning, wise investment in nature-based and engineered solutions, supporting residents who wish to relocate from vulnerable areas, and ensuring that what we build today can stand the test of time and a changing climate, every New Jersey community can position itself to confront the challenges that lie ahead. ■

Endnotes

1. New Jersey Dept. of Envt'l Prot., Eds. R. Hill, M.M. Rutkowski, L.A. Lester, H. Genievich, N.A. Procopio, 2020, supplemented, 2022, *available at* climatechange.nj.gov.
2. Available at nj.gov/dep/climate change/mitigation/
3. *Projected Changes in Extreme Rainfall in New Jersey* (DeGaetano, A., Northeast Regional Climate Center), 2021, *available at* nj.gov/dep/dsr/publications/projected-changes-rainfall-model.pdf
4. *See* dep.nj.gov/inland-flood-protection-rule/

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GREENWASHING CLAIMS

Agency Guidance, Litigation Trends Provide Road Map for Marketers

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By Melissa A. Clarke and Andrea A. Lipuma

American consumers are increasingly seeking environmentally friendly "green" products.[1] In response, companies employ "green" marketing to advertise the purported environmental benefits of their products. But what companies believe their green claims mean and how consumers interpret those claims may not always be in sync.

"Greenwashing" is deceptive marketing, and it occurs when companies make false, misleading or exaggerated claims about the environmentally beneficial nature of their products, services or their business. For example, greenwashing occurs when goods or services have been misrepresented as "sustainable," "environmentally responsible" or "humanely raised." Greenwashing claims will vary by product and service, as well as across markets and jurisdictions. Broadly speaking, greenwashing claims are based on common law allegations of fraud, misrepresentation, false advertising, breach of express warranty, unjust enrichment and/or pursuant to specific state consumer protection laws. Greenwashing suits often target the representations

made in marketing materials, product labels and even corporate filings.

Greenwashing Trends: Agency Oversight

The Federal Trade Commission's Green Guides

The Federal Trade Commission (FTC) enforces federal consumer protection laws that prevent fraud, deception and unfair business practices. The FTC has developed "Green Guides for the Use of Environmental Claims" ("Green Guides"), which set forth the FTC's current views about environmental marketing claims to help marketers avoid making claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45. The Green Guides were first issued in 1992 and were revised in 1996, 1998 and 2012. The guidance they provide includes: 1) general principles that apply to all environmental marketing claims; 2) how consumers are likely to interpret particular claims and how marketers can substantiate these claims; and 3) how marketers can qualify their claims to avoid deceiving consumers. More specifically, the Green Guides apply to claims about the environmental attributes of a product, package or service in connection with the marketing, offering for sale or sale of such item or service to individuals or businesses. This includes environmental claims in labeling, advertising, promotional materials and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names or any other means.

The Green Guides consist of general principles, specific guidance on the use of particular environmental claims, and examples. The examples provide the FTC's views on *how reasonable consumers likely interpret certain claims*. Whether a particular claim is deceptive will depend on the net impression of the advertisement, label or other promotional material at issue. That is, the Green Guides focus on consumer deception, *whether intentional or not*. The Green Guides are also a primary source of definitions of terms commonly used in environmental marketing campaigns.

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As administrative interpretations of the law, the Green Guides are not themselves enforceable.[2] That said, the FTC can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the Green Guides. In any such enforcement action, the FTC must prove that the challenged practice is unfair or deceptive in violation of Section 5 of the FTC Act. For example, on April 4, 2022, the FTC commenced two nearly identical lawsuits charging that, in marketing and selling rayon textile products as "bamboo," the defendant retailers each participated in deceptive acts or practices in violation of Section 5 of the FTC Act and engaged in mislabeling or deceptive advertising of textile products in violation of the Textile Act, 15 U.S.C. § 70 et seq., and the Textile Rules, 16 C.F.R. Part 303.[3] Each action resulted in a Stipulated Order and Judgment for Civil Penalties, Permanent Injunction, and Other Relief, including more than $5 million in civil penalties, collectively, and compliance reporting obligations.[4]

The Green Guides do not preempt federal, state or local laws. Conversely, compliance with those laws will not preclude FTC enforcement action under the FTC Act. Thus, while the Green Guides can help companies better understand what kinds of statements might provoke claims, compliance with the FTC Green Guides does not necessarily eliminate a company's exposure to greenwashing litigation.

The FTC's most recent proposed update of the Green Guides includes new guidance on marketers' use of product certifications and seals of approval, claims about materials and energy sources that are "renewable" and "carbon offset" claims. In December 2022, the FTC announced it was seeking public comment on potential updates to its Green Guides. The anticipated update is on hold as the FTC reviews thousands of responses. Commenters have called for, among other things, measurable and objective standards and formal rulemaking instead of guidance to provide more clarity and "even the playing field" for

claims of sustainability or carbon neutrality.[5]

Securities and Exchange Commission Proposed Rules

In May 2022, the Securities and Exchange Commission (SEC) issued two new sets of proposed rules intended to combat greenwashing by investment funds, the "Investment Company Names" ("Names Rule") and "Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies" ("ESG Disclosure Rule"). These rules, when implemented, will provide additional bases for investors looking to litigate purported material misrepresentations or omissions involving greenwashing. While these SEC initiatives are aimed at investor protection, rather than consumer goods, they further highlight the increasing attention on public-facing representations in the context of environmental impacts of goods and services. These regulatory efforts are similar to those being undertaken by other advanced economies (e.g., the European Union and the United Kingdom).

Greenwashing Trends: State Government

State attorneys general have filed greenwashing lawsuits to address deceptive marketing and included greenwashing claims in climate change suits. In October 2011, the Attorney General of California filed a first-of-its-kind greenwashing lawsuit against three companies that allegedly made false and misleading claims by marketing plastic water bottles as "100 percent biodegradable and recyclable."[6]

New Jersey is no stranger to government-led litigation aimed at consumer protection. Indeed, the state Attorney General, the New Jersey Department of Environmental Protection and Acting Director of the New Jersey Division of Consumer Affairs (collectively, the "State") has commenced a lawsuit against five oil companies—ExxonMobil, Shell Oil, Chevron, BP and ConocoPhillips—as well as the American Petroleum Institute for their alleged role in deceiving consumers and the public about climate change.[7] The complaint, premised on the State's allegation that, "for decades, the fossil fuel industry has misled consumers and the public about climate change" seeks to ensure defendants "bear the costs of that deceptive commercial activity, rather than the State, its taxpayers, its residents, or broader segments of the public."[8] Claims include failure to warn, negligence, impairment of the public trust, trespass, public nuisance, private nuisance and violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2 et. seq.[9] New Jersey joins at least six other states in bringing climate claims against oil companies.[10]

Greenwashing Trends: The Private Bar

The number of greenwashing actions nationwide have steadily increased in recent years, and the majority of greenwashing cases have been filed by private attorneys as class actions. Greenwashing cases typically rely on common law and state statutory causes of action. The common law claims may include allegations of fraud, misrepresentation, unjust enrichment and breach of express warranty. The statutory causes of action typically rely on state consumer protection laws that enable private plaintiffs to bring class action claims for violations of those statutes, which protects consumers from fraudulent and deceptive business practices. Recent litigation has targeted manufacturers of consumer products, especially apparel and food producers.

Many greenwashing suits focus on alleged misrepresentations about "sustainable" manufacturing or sourcing and "recyclability." This is true of various plastic bottle suits. For example, in *Earth Island Institute v. Brands*, the plaintiff alleged that a bottling company misled consumers by portraying itself as "sustainable" and committed to reducing plastic pollution, while engaging in other environmentally harmful practices.[11] The court denied the defendant's motion to dismiss, holding that whether these statements were misleading was a fact question for the jury.[12]

Similarly illustrative of the perils of "sustainable" claims is the ALDI Atlantic salmon case.[13] The complaint alleges ALDI made deceptive sustainability claims in marketing its fresh Atlantic salmon products by using the label "Simple. Sustainable. Seafood," while sourcing its salmon from large industrial fish farms that use environmentally destructive and unsustainable practices.[14] The complaint included counts under New York statutes prohibiting "[d]eceptive acts or practices in the conduct of any business, trade or commerce," as well as "[f]alse advertising in the conduct of any business, trade or commerce."[15] The class-action suit was voluntarily dismissed in November 2023, based on a settlement wherein ALDI agreed, among other things, to revise its fresh Atlantic salmon product labeling and marketing.

Efforts to use third-party seals of approval on product marketing or packaging is also fodder for greenwashing litigation, especially where those seals can mislead the reasonable consumer. In *Hemy v. Perdue Farms, Inc.*, the plaintiff alleged it was misleading to place a U.S. Department of Agriculture (USDA) verified seal close to claims that the defendant's chickens were "humanely raised" and "raised cage free" because the seal suggested that the USDA had specifically approved these statements.[16] The court denied the defendant's motion to dismiss, noting that the plaintiff's allegations included survey results demonstrating that 58% of consumers believed the "USDA Process Verified" shield meant the defendant met the USDA's standards for the treatment of chickens.[17]

Animal cruelty cases may also fall within the ambit of greenwashing litigation. In *Usler v. Vital Farms, Inc.*, the court considered whether Vital Farms misled consumers by labelling its egg cartons as "humane" and "ethical," where evidence suggested that the company at least partially sourced products from inhumane facilities.[18] Vital Farms argued that its statements were not actionable, as they were "imprecise, subjective, and opinions" and not susceptible of definition.[19] The court rejected these arguments, holding that Vital Farms' statements—"humane," "ethical," and "pasture raised"—were indeed "susceptible of definition," and a reasonable consumer would understand the terms to bear their plain meaning.[20]

Courts have generally dismissed challenges to representations based on publicly available methodology, "aspirational statements," and humorous statements or puffery. In *Dwyer v. Allbirds*, for instance, the plaintiff took issue with the defendant's commercials for wool sneakers, which showed "happy" sheep in "pastoral settings," as well as advertisements depicting sheep captioned, "What if every time you got a haircut they made shoes out of it? That would be pretty cool."[21] Ultimately, the court dismissed the plaintiff's claims, holding that the ads were "obviously intended to be humorous" and "[made] no representations at all."[22] Moreover, the *Allbirds* court rejected the plaintiff's challenge to Allbirds' sustainability claims since the company outlined its methodology on its website and made "clear what [was] included in its carbon footprint calculation."[23] Similarly, in *Lizama v. H&M Hennes & Mauritz LP*, the court dismissed the plaintiff's claim because H&M never made a misrepresentation of fact regarding its "conscious choice collection;" the defendant retailer only claimed the clothing line contained "more sustainable materials" and further disclosed its methodology by providing "on its website all of the information [a consumer] needed to determine the source, composition and relevant comparison of the 'more sustainable materials' used by H&M in its conscious choice collection."[24]

Courts have also dismissed greenwashing cases where the purported misrepresentation was a result of circumstances beyond the defendant company's control. For instance, in *Duchimaza v. Niagara Bottling, LLC*, a plaintiff took issue with a water bottle manufacturer's marketing claims that its bottle was "100% recyclable," arguing that the product consisted of materials that are not recyclable due to the limited capacity of local and nationwide recycling systems.[25] The court relied on the Green Guides in evaluating the "recyclable" claims and concluded the buyer failed to state claims for deceptive practices and false advertising.[26] Similarly, a court in California expressed skepticism about claims that various bottling companies misled consumers about the recyclability of their beverage bottles because "the consumer deception alleged in the [first amended complaint] is tied to forces and circumstances well beyond defendants' control," namely, "such unpredictable factors as changes in importation policy by the national government in China, and the economics of the recycling business."[27]

Conclusion

As more greenwashing claims are decided, and the FTC and SEC provide additional guidance on greenwashing, it will become increasingly important for companies to adjust their marketing to avoid costly litigation. Recent greenwashing cases suggest that courts and litigants often rely on the Green Guides' standards when evaluating greenwashing claims, and companies must exercise caution when using certain broad terms like "sustainable," "humane" and "recyclable." If the marketer cannot substantiate the claim, it should consider avoiding its use. Unqualified, general environmental benefit claims like "green" or "eco-friendly" will be difficult—if not impossible—to substantiate.

Best practices for companies making green claims include becoming familiar with the FTC's Green Guides, particularly the definitions of terms commonly used in "green" marketing campaigns, basing marketing on claims that can be substantiated, and qualifying claims that could be viewed as vague or overbroad with clear, prominent and specific environmental benefits. Courts may dismiss greenwashing cases where companies publicly disclosed the basis of their sustainability claims ("show your work"), used puffery, made statements that were "obviously intended as humorous" and/or were subject to factors beyond their control, like global economics. ■

Endnotes

1. Eco-Friendly and Green Marketing Claims, *available at*: ftc.gov/news-events/topics/truth-advertising/green-guides.
2. While the Green Guides are currently nonbinding, the FTC is considering codifying them into regulations enforceable by civil penalties. In addition, certain states have incorporated the Green Guides into state law.
3. Press release with links to cases, *available at:* ftc.gov/news-events/news/press-releases/2022/04/ftc-uses-penalty-offense-authority-seek-largest-ever-civil-penalty-bogus-bamboo-marketing-kohls.
4. Because the Green Guides rely on enforcement via Section 5 of the FTC Act, the FTC generally cannot obtain money penalties in connection with first-time violations related to the Green Guides.

5. After the comment period ended in April 2023, the FTC held a public workshop in May 2023 to gather further opinions on "recyclable" claims and requested additional public comments on that issue. The FTC may hold additional public workshops focused on other specific issues, such as sustainability or carbon offsets, and solicit further comments on those issues before taking any further action with respect to updating the Green Guides or commencing a formal rulemaking process.
6. Complaint, *available at*: oag.ca.gov/system/files/attachments/press_releases/n2577_complaint.pdf.
7. *Platkin, et al v. Exxon Mobil Co., et al.*, MER L-001797-22 (N.J. Super. Ct.), Complaint and Jury Demand, *available at*: nj.gov/oag/newsreleases22/2022-1018_NJ-Climate-Complaint-FILED.pdf.
8. *Id.*, at p. 1, 13.
9. Given New Jersey's robust CFA, with its fee shifting and treble damages provisions, the state may be a particularly attractive venue for would-be greenwashing litigants.
10. Rhode Island, Delaware, Connecticut, Massachusetts, Minnesota and Vermont have pursued similar climate actions.
11. No. 2021 CA 003027 B, 2022 WL 2132634, at *1 (D.C.Super. June 07, 2022).
12. *Id.* at *5.
13. *Rawson v. ALDI, Inc.*, No. 21-CV-2811, 2022 WL 1556395 (N.D. Ill. May 17, 2022).
14. *Id.* at *1.
15. N.Y. Gen. Bus. Law §§349-50 (McKinney).
16. No. CIV.A. 11-888 MAS, 2013 WL 1338199 (D.N.J. Mar. 31, 2013).
17. *Id.* at *8.
18. No. A-21-CV-447-RP, 2022 WL 1491091 (W.D. Tex. Jan. 31, 2022), report and recommendation adopted, No. 1:21-CV-447-RP, 2022 WL 1514068 (W.D. Tex. Mar. 2, 2022).
19. *Id.* at *4.
20. *Id.* at *4-5.
21. 598 F.Supp. 3d 137, 152, 153 (S.D.N.Y. 2022).
22. *Id.* at 152.
23. *Id.* at 150.
24. No. 4:22 CV 1170 (RWS), 2023 WL 3433957, at *6 (E.D. Mo. May 12, 2023).
25. 619 F. Supp. 3d 395 (S.D.N.Y. 2022).
26. *Id.* at 412.
27. *Swartz v. Coca-Cola Co.*, No. 21-CV-04643-JD, 2023 WL 4828680, at *4 (N.D. Cal. July 27, 2023).

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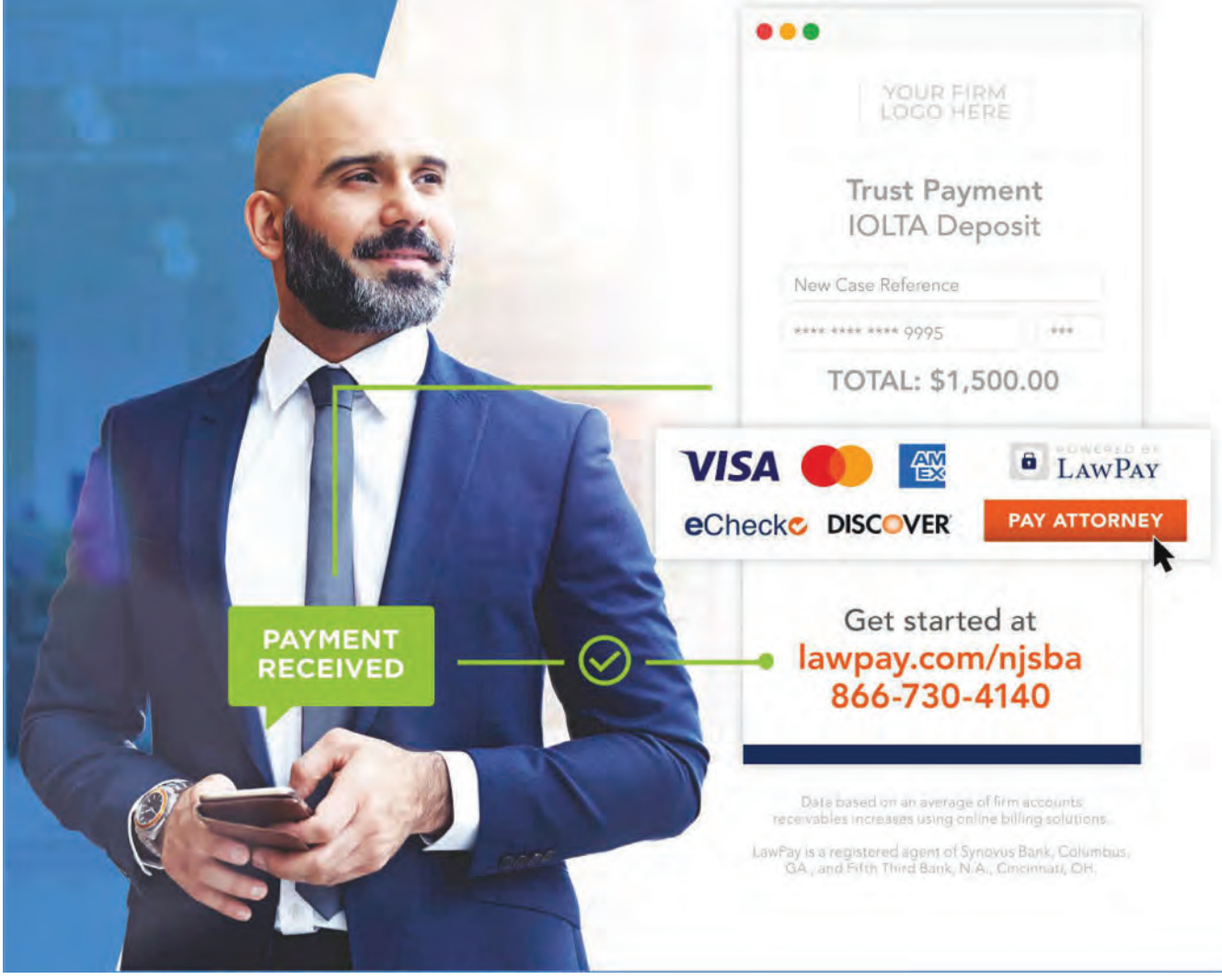

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Great Mother of Pearl!

The Looming Growth of Offshore Aquaculture in the Garden State and How to Navigate its Legal Framework

By Zachary A. Klein

ZACHARY A. (ZAK) KLEIN *is an associate attorney with Cullen & Dykman LLP in Princeton. He is a former Law Fellow at the National Sea Grant Law Center, where he hosted Season 2 of the* Law on the Half Shell *podcast. Zak has previously published and lectured internationally on the role of property rights in authorization frameworks for offshore aquaculture operations.*

Aquaculture is an industry that is uniquely well-suited for growth both globally and in the United States in the coming decades. For policymakers grappling with how to ensure food security for the masses despite the finite natural resources at their disposal, ocean and coastal areas offer considerable potential to boost production of protein and other vital nutrients. New Jersey must be prepared for the opportunities and challenges that rising demand for seafood will bring. In addition to the more high-profile worlds of commercial and recreational fishing, which enjoy widespread popularity in the Garden State, few members of the public—and even fewer members of the legal professional—are aware that New Jersey also enjoys a long history of aquaculture, which is the term for the controlled cultivation of aquatic organisms, extending back to Native American practices that predate the arrival of European settlers. Broadly speaking, aquaculture can occur directly in natural waterways or in controlled onshore tanks. It can also occur in both freshwater and saltwater settings, and the species involved range from shellfish and seaweeds to finfish like catfish and salmon.

For purposes of context and clarity, this article will focus only on saltwater aquaculture operations located in the waters of the State of New Jersey, *i.e.*, "the ocean and its estuaries, all springs, streams, wetlands, and bodies of surface or ground water, whether natural or artificial, within the boundaries of the State of New Jersey or subject to its jurisdiction."[1] The state's jurisdiction over ocean waters, in turn, extends three nautical miles (nm) from the shore.[2] Thus, even for practitioners who are unlikely to counsel offshore aquaculture operations directly, New Jersey's legal framework for these activities affords insight into aspects of environmental law, property law, and administrative law that will benefit a variety of attorneys.

The Lay of the (Submerged) Land: The Public Trust Doctrine and Related

The state's authority over the seabed and other resources related to their tidal waters is derived from the Public Trust Doctrine (PTD or the Doctrine). The PTD is a principle with roots in ancient Roman law. The Institutes of Justinian, a sixth century codification of Roman civil law, declares, "By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea."[3] This has traditionally been interpreted as imposing upon a sovereign the obligation to create and preserve public rights of access and use of tidal waterways and their shores for purposes of navigation, fishing, and commerce,[4] and plaintiffs have recently started pursuing climate-related litigation under the Doctrine with some success as well.[5] The PTD was preserved in English common law and inherited by the original 13 colonies after the Revolution, when the rights to tidal waterways and their shores—which were previously reserved to the Crown—passed to the newly created American states.[6]

The interpretation and application of the Doctrine varies from state to state, and New Jersey has one of the most expansive Doctrines in the nation. The state Supreme Court originally recognized the state government's PTD obligations in the 1821 case *Arnold v. Mundy*, where the Court held that the public trust included all land between the high and low tidewater levels—not just tidal waters.[7] The Doctrine has since been applied in New Jersey not only to natural resources directly such as marshes and upland forests, but also to the public's right to recreational uses of the natural resources as well.[8] In fact, the state Supreme Court has explicitly clarified that "[t]he [Doctrine], like all common law principles, should not be considered fixed or static, but should be molded and extended to meet the changing conditions and needs of the public it was created to benefit."[9] Familiarity with New Jersey's PTD is thus critical for not only navigating the framework for aquaculture operations in the state's tidal waterways, but also for providing sound legal advice to any clients who engage in activities involving the use of state waters, or even the possession or use of land that was formerly flowed by tidal waters.

New Jersey offers four instruments for providing aquaculture operations with access to the tidal waterways: riparian grants, private leases, Aquaculture Development Zone (ADZ) leases, and tidelands licenses. However, riparian grants—which are deeds from the state for the sale of tidelands—are no longer a viable option for aquaculture operations because New Jersey now issues riparian grants only for filled tidelands; i.e., riparian grants can no longer be obtained for currently flowed tidelands. Meanwhile, private leases are available to shellfish aquaculture operations in the Atlantic Ocean and Delaware Bay.

Staking Your Claim

While seaweed aquaculture or finfish aquaculture operations can theoretically be authorized under New Jersey's framework for aquaculture in tidal waterways, the state's policies governing tidal aquaculture are generally oriented around structural shellfish aquaculture.[10] Structural aquaculture refers to the cultivation of aquatic organisms through the use of equipment and gear, such as cages or racks.[11] Structural aquaculture operations are unique in that they may take up large areas of water that would otherwise be open waters of the state, and the structures at these sites pose an enlarged risk of interfering with public trust rights to the area, such as navigation.[12] As such, aquaculture operations in New Jersey need to obtain a Tidelands instrument,

which gives them the right to occupy tidally flowed state waters, in addition to permits from the Department of Environmental Protection (DEP) that authorize the actual activities and operations at the site.

New Jersey offers four instruments for providing aquaculture operations with access to the tidal waterways: riparian grants, private leases, Aquaculture Development Zone (ADZ) leases, and tidelands licenses. However, riparian grants—which are deeds from the state for the sale of tidelands—are no longer a viable option for aquaculture operations because New Jersey now issues riparian grants only for filled tidelands; *i.e.*, riparian grants can no longer be obtained for currently flowed tidelands.[13] Meanwhile, private leases are available to shellfish aquaculture operations in the Atlantic Ocean and Delaware Bay.[14] These leases must be obtained from the Bureau of Shellfisheries, which is part of the state Department of Environmental Protection's Division of Fish and Wildlife, in coordination with the Shellfish Council.[15]

Additionally, New Jersey has developed multi-operation ADZs in the Delaware Bay to promote the development of shellfish aquaculture in the Garden State. An ADZ has several purposes. First, it streamlines the permitting process for potential oyster farms because the New Jersey Bureau of Shellfisheries obtains all necessary permits from the Corps and relevant state agencies on behalf of individual growers within the ADZ.[16] Grouping multiple aquaculture farms in relatively close proximity to each other consequently facilitates efficient state management of aquaculture operations, and likewise minimizes potential conflicts by centralizing water access, access to seed and equipment, technical support for farms, and post-harvest processing.[17]

Finally, aquaculture operations must consider the need for an aquaculture license from the Tidelands Resource Council (TRC). Should the aquaculture operation in question already own the adjacent upland property or have permission from that property's owner to use and occupy the offshore area, then an aquaculture license can be issued by the DEP's Bureau of Tidelands Management without obtaining TRC approval. Conversely, if the operation cannot or does not secure the shoreside property owner's permission, it can seek TRC approval of an aquaculture license only after providing six months' notice to the shoreside property owner.[18] Regardless of which path an applicant pursues, it must already have a Waterfront Development permit from DEP for in-water structures at the site before an aquaculture license will be issued.[19]

Show Me the Money: Bringing the Product to Market and Accessing State Support

For aquaculture operations interested in turning a profit on their activities, one key state approval is the commercial shellfish license, which is required to sell any shellfish or to "catch" more than 150 shellfish per day.[20] In fact, a commercial shellfish license is required prior to applying for a shellfish lease along the Atlantic Coast and within the Delaware Bay's ADZ. For operations in the Delaware Bay but outside of the ADZ, meanwhile, a license is not required prior to applying for a lease, but a license will nevertheless need to be secured before harvesting or selling any product.[21] A recreational shellfish license is also available for operations that do not "catch" more than 150 shellfish per day or offer their shellfish for sale.[22]

In addition to a commercial shellfish license, any producers who anticipate production of aquacultured products worth $2,500 or more annually must obtain an Aquatic Farmer License (AFL) from the New Jersey Department of Agriculture (NJDA). The AFL also affords aquaculture operations many benefits to licensees beyond "merely" authorizing their ability to sell product in meaningful volume and, thus, to profit from their aquaculture activities. More specifically, AFLs demonstrate ownership of the organisms being raised, which is helpful when dealing with products that are under size limits or seasonality limitations, such as summer flounder and hybrid striped bass.[23] The AFL system also prevents the introduction of aquatic invasive species and other pests that can harm aquaculture operations and wild stocks alike.[24] Moreover, akin to the ADZ, AFLs reduce the regulatory burden on aquaculture operations by facilitating the smart planning of sites and the early identification of any additional permits that operations may need, thereby reducing the time and money required to complete the permitting process without compromising environmental integrity.[25]

Separately, AFLs serve as an invaluable lifeline to various forms of government support for aquaculture operations. Not only do AFLs establish operations' eligibility for marketing assistance from the NJDA and other programs at both the state and federal level,[26] but they likewise ensure that operations have records of their production history, which are critical for receiving disaster relief and other forms of funding.[27] Consequently, the state recommends that all aquaculture operations obtain an AFL, even if they are not technically required to do so based on their anticipated production levels.[28]

Conclusion

As the U.S. and global populations continue to grow, the limitations of land-based food production systems are inspiring widespread contemplation of how to meet demand and ensure food security for the masses. One viable solution is increasing the cultivation of finfish, shellfish and seaweed, which is more commonly known as aquaculture, in offshore waters. As a coastal state with

a rich history of aquaculture, New Jersey is well-positioned to capitalize on the industry's impending boom. Attorneys in the Garden State should therefore understand New Jersey's legal framework for offshore aquaculture operations to ensure they can provide sound advice to clients moving forward.

While this article provides an overview of the legal framework for offshore aquaculture in the state, it is far from exhaustive. Attorneys with clients who engage in offshore aquaculture must be prepared to deal with other sources of law that impact these activities, such as New Jersey's tax code and Right to Farm Act. Nevertheless, a basic familiarity with the legal framework for offshore aquaculture operations offers invaluable insight into aspects of environmental law, property law, and administrative law that are relevant to a variety of legal practices throughout the state. ■

Endnotes

1. N.J.A.C. 7:9B-1.4.
2. *See* 43 U.S.C. § 1301(b).
3. J. Inst. 2.1.1, in The Institutes of Justinian, With Notes 67 (Thomas Cooper ed. & trans., 3d ed. 1852).
4. Tidal waterways include oceans, bay, and tidal rivers.
5. *See*, *e.g.*, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Dist. Ct.) (14 Aug. 2023)
6. All other states acquired ownership of the beds and banks of these waters upon their statehood as a result of the Equal Footing Doctrine, under which all subsequent states were admitted with the same rights as the original thirteen. *See* Idaho v. United States, 533 U.S. 262, 272 (2001); Robin Kundis Craig, *A Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecological L. Q. 53, 65 (2010); *see also* United States v. Alaska, 521 U.S. 1, 5 (1997); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 283-84 (1997); United States v. Holt State Bank, 270 U.S. 49, 55 (1926); Weber v. Bd. of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65-66 (1873).
7. 6 N.J.L. 1 (N.J. 1821).
8. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 2 ELR 20519 (N.J. 1972).
9. *Id*. at 309.
10. N.J. Tidelands Resource Council, Resolution Concerning Aquaculture License Fees Assessed by the Tidelands Resource Council (Adopted Mar. 3, 2010, Revised Sept. 6, 2027, and Re-authorized Sept. 14, 2022) 1, dep.nj.gov/wp-content/uploads/wlm/downloads/tidelands/td_009.pdf?bcs-agent-scanner=1b73ed28-8693-8344-85fa-8e4f01b89c9d.
11. *See id*.
12. *See id*.
13. *Tidelands*, N.J. Dept. of Envtl. Prot. Watershed & Land Mgmt. (last revised Jan. 18, 2024), dep.nj.gov/wlm/tidelands/#:~:text=A%20Riparian%20Grant%20is%20a,by%20the%20mean%20high%20tide.
14. *See* N.J.A.C. §§ 7:25-24.1 – 7:25-24.17.
15. N.J.S.A. § 50:1-23.
16. Catherine Janasie, *The Effects of the Endangered Species Act on Aquaculture in New Jersey*, Natl. Sea Grant L. Ctr. 2 (May 2019), nsglc.olemiss.edu/projects/shellfish-aquaculture/files/esa-nj.pdf?bcs-agent-scanner=21b001f2-6728-2044-b0d7-40beb591553e.
17. *See Commercial Shellfish Leasing on the Aquaculture Development Zone*, "Overview of Shellfish Leasing," N.J. Dept. Envtl. Prot. (last revised Apr. 28, 2023), dep.nj.gov/aquaculture/adz-lease/.
18. N.J. Tidelands Resource Council, Resolution Concerning Aquaculture License Fees Assessed by the Tidelands Resource Council (Adopted Mar. 3, 2010, Revised Sept. 6, 2027, and Re-authorized Sept. 14, 2022) 1, dep.nj.gov/wp-content/uploads/wlm/downloads/tidelands/td_009.pdf?bcs-agent-scanner=1b73ed28-8693-8344-85fa-8e4f01b89c9d [hereinafter "TRC Resolution").
19. TRC Resolution, *supra* xviii.
20. N.J.S.A. § 50:2-2(b).
21. *Obtaining a Commercial Shellfish License* (last revised Mar. 27, 2023), N.J. Dept. Envtl. Prot., dep.nj.gov/aquaculture/obtaining-a-commercial-shellfish-license/.
22. N.J.S.A. § 50:2-2(a).
23. N.J.A.C. 2:89 Appx. A at (1) and (4).
24. *See id*. at (2).
25. *See id*. at (3) and (4).
26. *Id*. at (6)-(7).
27. *Id*. at (5).
28. *See* N.J.A.C. 2:89-2.1(a)(1).

GO GREEN

NJDEP Encourages GSR Remediation

By Andrew T. Alessandro

ANDREW T. ALESSANDRO, *an associate in the Environmental Group at Gibbons P.C. in Newark, handles a wide variety of cases in both state and federal courts throughout New Jersey. His practice focuses on legal issues concerning site access, investigation and cleanup, as well as environmental litigation, particularly involving the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the New Jersey Spill Compensation and Control Act.*

On Sept. 20, 2023, the Contaminated Site Remediation & Redevelopment (CSRR) Program within the New Jersey Department of Environmental Protection (NJDEP or Department) issued new guidance encouraging the implementation of green, sustainable and resilient remediation (GSR) techniques in cleanups of contaminated sites throughout the state. In doing so, New Jersey joined other states in the tri-state area, such as New York and Connecticut, in issuing guidance documents to promote green and sustainable remediation measures. According to the guidance, titled, "Administrative Guidance for Green, Sustainable, and Resilient Remediation," GSR "is the site-specific employment of products, processes, technologies, and procedures that mitigate contaminant risk to receptors while making decisions that are cognizant of balancing community goals, economic impacts, and environmental effects." The guidance states that, while the goal of a responsible party remains to protect human health and the environment, the respon-

sible party should also consider the environmental, social, and economic impacts of remediation, including potential benefits to the site and surrounding areas. It is a set of recommendations intended to guide remediating parties toward taking a holistic approach to site remediation by encouraging parties to consider not just the contaminated site itself, but the surrounding communities, as well as the long-term effects of climate change.

NJDEP's GSR Guidance Emphasizes Environmental Justice and Clean Energy

The Department is encouraging remediating parties to take a holistic approach to site remediation by incorporating two of the Department's top priorities under the Murphy administration—clean energy and environmental justice (EJ)—into the state's remediation guidance. Under the Environmental Justice Law (EJ Law),[1] which rules were promulgated by NJDEP in April 2023, the Department directs applicable parties to assess how a proposed facility impacts certain environmental and public health stressors, and requires them to meaningfully engage with local stakeholders throughout the permitting process. The guidance explicitly incorporates those requirements under the EJ Law by recommending that, if a contaminated site is located in an overburdened community,[2] the responsible party should understand the current environmental stressors of that community and consider partnering with local stakeholders to help address the community's environmental justice concerns. The guidance also encourages the use of urban cooling strategies (such as green open spaces, green infrastructure, and tree canopy development on urban brownfield redevelopment projects) to improve public access to parks within overburdened communities. By incorporating EJ into the remediation of contaminated sites, the Department has stayed true to its commitment to "coordinate a whole of government approach to environmental justice."[3]

Moreover, in January 2020, Gov. Phil Murphy signed the Energy Master Plan directing the Department to make regulatory reforms aimed at reducing emissions and adapting to climate change to meet the state's goal of achieving 100% clean energy by the year 2050. To help the state meet its ambitious energy goals, the guidance encourages remediating parties to use reasonably feasible renewable energy sources such as solar, wind, biomass and biogas, use clean diesel construction equipment on site retrofitted with emission control technologies, and direct that all on-road vehicles and non-road construction equipment at the construction site comply with the three-minute idling limit pursuant to N.J.A.C. 7:27-14 and N.J.A.C. 7:27-15.

How Can Practitioners Incorporate GSR Principles at Contaminated Sites?

To incorporate the Department's goals in remediating contaminated sites, the GSR guidance developed language, informed by the Environmental Protection Agency's (EPA) Greener Cleanups Contracting & Administration Toolkit, which is "to be inserted into CSRR contracts." While the recommended contractual language provided by the guidance provides examples for remediating parties and their Licensed Site Remediation Professional (LSRP) or consultant to consider in drafting contracts, the guidance leaves a few questions unanswered. For instance, the guidance was developed to be inserted into CSRR contracts, but exactly which types of contracts can we expect to see this language in? Moreover, the guidance is unclear as to which stage of the remediation process its recommendations apply to.

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What types of agreements?

The recommended contractual language in the GSR guidance applies to CSRR contracts. One can therefore presume that the language will be incorporated into all agreements that private parties enter into with the state. For instance, one may expect to see the guid-

ance principles inserted into administrative consent orders and consent judgments used to resolve litigation filed by the state. Such agreements may require that the settling private party remediate a contaminated site with these principles at the forefront of its remedial efforts. Moreover, the Green Acres Program, which works with landowners to preserve environmentally sensitive open spaces, among other areas, may incorporate these principles into its agreements by, for example, requiring landowners as a condition of sale to consider the future effects of climate change to ensure that the land remains both useful and preserved for decades to come. Lastly, one can expect the Office of Brownfield & Community Revitalization to require parties that receive Brownfields funds to incorporate the recommended contractual language into agreements entered under the Brownfield and Contaminated Site Remediation Act.[4] In fact, the guidance notes that CSRR has provided a $300 million tax credit program, established by the state's Economic Recovery Act of 2020, to the state's Economic Development Authority's Brownfields Redevelopment Incentive Program, which requires that a project-specific Green Remediation Plan be submitted following approval of an application.

Practitioners should also consider the possibility that the recommended contractual language could be incorporated into private party agreements any time parties are required to conduct remediation pursuant to state laws and regulations. For instance, any time a party is required to conduct a cleanup pursuant to the New Jersey Spill Compensation and Control Act (Spill Act),[5] or is otherwise required to remediate a site under the Technical Requirements for Site Remediation,[6] the selling party may be required to conduct the cleanup "in accordance with all applicable laws and regulations, *including but not limited to the Administrative Guidance for Green, Sustainable, and Resilient Remediation*." A potentially responsible party that has been ordered to conduct cleanup of a contaminated site pursuant to the Spill Act may require that the contract with their LSRP or contractor includes language from the guidance.

Which stage of the remediation process does the guidance apply to?

While the guidance falls short in specifically identifying in which stage of the remediation process remediating parties can incorporate the recommended contractual language, guidance documents issued by other states, as well as EPA, helps to answer that question by providing concrete examples of where in the remediation process parties can incorporate GSR principles. These examples, along with a closer look at the guidance itself, reveal that the recommended contractual language should be incorporated at every stage of a remediation, starting with site characterization and continuing through remedy implementation and site management.

The guidance encourages LSRPs and contractors to ensure that a contaminated site is resilient to climate change impacts by integrating climate change vulnerability assessments and adaptation measures into the remediation process. In June 2023, the New York Department of Environmental Conservation issued a GSR remediation guidance that recommends GSR practices be implemented as early as the site characterization stage. When assessing a site at this preliminary stage, practitioners should be mindful of a site's resilience by considering the anticipated reuse of a site along with the site's vulnerability to the anticipated effects of climate change. Taking these factors into consideration, a remediating party will be equipped to determine whether the intended use of a site will be situated in a sustainable area, and what, if any, measures will be required to ensure that the site increases its reliance to stay ahead of anticipated climate change effects. By way of example, at the General Motors (Central Foundry Division) national priority list site in upstate New York, measures were

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taken to adapt to climate change by considering hazards posed by projected climate scenarios in the region. At the remedial design phase, the on-site cap was designed so that the toe of the capped industrial landfill was approximately 15 feet above the historic average height of the river nearest the site, to account for the fact that the site was vulnerable to flooding caused by extreme precipitation events or rapid snowmelt. This measure will help to ensure the long-term protectiveness of the site remedy under potentially higher river levels in the future.[7]

Moreover, during the remedial design phase, a remediating party may implement guidance language to "incorporate options to minimize the environmental footprints of a cleanup" by requiring the contractor to draft and record a Spreadsheet for Environmental Footprint Analysis (SEFA). The SEFA was developed by EPA to help decision-makers analyze the environmental footprint of a site cleanup project. To generate a footprint analysis, the decision-maker inputs information that quantifies 21 metrics that are core elements of a green remediation, including onsite hazardous waste generated, refined materials used on site, total energy use and total emissions of gases that trap heat in the atmosphere (or so-called greenhouse gases).

The GSR guidance further encourages LSRPs and contractors to use the cleanest construction equipment available by, at minimum, using diesel construction equipment retrofitted with emission control technologies, ensuring proper maintenance of the equipment, and minimizing idling for all non-road equipment and generators powered by diesel engines. By way of example, EPA provides different methods for minimizing fuel emissions during the construction of a pump and treat system by using biodiesel rather than petroleum-based lubricants to operate machinery and equipment, and by deploying direct-push drilling rigs rather than rotary drilling rigs, which can reduce the duration of drilling by as much as 60%. The guidance also promotes the reuse and recycling of industrial materials. By way of example, at the Pharmacia & Upjohn Company LLC site in North Haven, Connecticut, materials were reused by using the excavated sediment, drill cuttings and excess grading soil and debris as grading fill below three cover systems for residual waste, as an alternative to offsite disposal or importing fill.[8]

Conclusion

Practitioners must not lose sight of the fact that while the Department is encouraging green, sustainable and resilient remediation techniques, the use of such measures does not exempt or preclude a party from remediating to all applicable standards, guidance, regulations and statutes, as set forth in the Administrative Requirements for the Remediation of Contaminated Sites.[9] Indeed, the goal of remediation remains to protect human health and the environment. By the same token, a responsible party will be remiss if it ignores the Department's recommendations, as the guidance may soon become mandatory. And, even if the guidance does not become mandatory in the near term, remediating parties must prepare themselves for the likelihood that the Department will insert GSR language into agreements with private parties. Since the guidance recommends considering GSR tools, a remediating party would be wise to ensure that any reports conducted during the remediation process describe in detail the GSR efforts taken. Those parties (and their consultants) should maintain documentation of GSR practices considered or employed in their files should the Department (or others) inquire about the remediation. ■

Endnotes

1. N.J.S.A. 13:1D-157.
2. According to the Environmental Justice Law, N.J.S.A. 13:1D-157, which rules the Department adopted on April 16, 2023, an overburdened community is defined as "any census block group, as determined in accordance with the most recent United States Census, in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency."
3. The Director of New Jersey's Office of Environmental Justice, Kandyce Perry, has stated that it is her role on behalf of the Murphy administration to "coordinate a whole of government approach to environmental justice, so that it is not just one department or agency's responsibility to try to further EJ." communitynews.org/princetoninfo/business/survivalguide/a-new-environmental-justice-paradigm-for-new-jersey/article_0682db98-e68d-11ec-a91b-ab439f880abf.html.
4. N.J.S.A. 58:10B-12.1
5. N.J.S.A. 58:10-23.11.
6. N.J.A.C. 7:26E-1.9.
7. *See* epa.gov/superfund/climate-adaptation-profile-general-motors-central-foundry-division.
8. See clu-in.org/greenremediation/profiles/pharmaciaupjohn.
9. N.J.A.C. 7:26C-1.2.

Natural Resource Damages in New Jersey

Six Years After Litigation Revival, More Guidance Needed

By Vinita Banthia, Matt Conley and Daniel Farino

New Jersey's Natural Resource Damages (NRD) litigation program has historically ebbed and flowed. The current litigation push, which began in 2018 with a declaration by state officials of a "New Day" in environmental enforcement, has focused on pursuing NRD claims—sometimes in concert with Environmental Justice (EJ) initiatives—with a goal of incentivizing more voluntary NRD settlements by responsible parties. However, the New Jersey Department of Environmental Protection (NJDEP) would likely see more voluntary NRD settlements if it provided more guidance and certainty as to how these damages will be calculated.

What Are Natural Resources and Who Owns Them?

NRD is a form of relief, typically in the form of monies or in-kind environmental projects or conservation efforts, payable to an NRD "trustee"—typically a state, tribe, and/or federal government—as compensation for injury to, destruction of, or loss of natural resources such as wetlands, biota, wildlife, plants, groundwater, drinking water supplies, and other related resources.[1] NRD may also include the reasonable cost of assessing these injuries. NRD trustees may demand restoration beyond regulatory remediation and cleanup standards—as well as compensation for the loss of use or services provided by a resource. As one would imagine, assessing and valuing "lost use" or "lost services" can be a highly subjective exercise, and numerous competing formulae and methodologies have been used to calculate NRD.

Natural resources are generally held in trust for the public by the appropriate government body. For example, federal trustees include the Secretaries of the Departments of Commerce and Interior. State trustees are designated by the state's governor to act on behalf of the public for certain natural resources within a state's boundaries. In New Jersey, the state has NRD authority under different statutes, primarily the Spill Compensation and Control Act (Spill Act), which appoints the state as the trustee of natural resources and provides for the restoration and replacement of natural resources as part of cleanup and removal costs. The New Jersey Water Pollution Control Act also recognizes the state's role in protecting natural resources. The Office of Natural Resource Restoration (ONRR) within the NJDEP oversees NRD issues, and the Commissioner of the NJDEP serves as the Trustee. In addition to the statutory authority, the state sometimes asserts common law authority over natural resources through the public trust or *parens patriae* doctrines.

Context and History

While New Jersey had early authority to assert NRD claims under the Spill Act, which was first enacted in 1977, NJDEP did not establish an NRD program until the 1990s with the creation of the Office of Natural Resource Damages (a predecessor to ONRR). At the outset, NJDEP officials adopted an approach similar to the federal government—*i.e.*, often working cooperatively with responsible parties (and co-Trustees) to jointly assess NRD and achieve a voluntary resolution (typically in the context of surface water discharge incidents, landfills, and Superfund sites).[2]

New Jersey's current NRD litigation scheme started around 2003 when the NJDEP's then-Commissioner made NRD claims a focus of a broader enforcement effort, which relied, in part, on outside, contingency-fee counsel to prosecute NRD claims. Among other efforts, the NJDEP issued the Passaic River Directive (directing 66 companies to assess and restore 18 sites within the Lower Passaic River watershed),[3] issued a new NRD

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Policy Directive, and sent approximately 4,000 Notices of Intent to initiate litigation to potentially responsible parties (RPs) targeted under the NRD Policy Directive. The NRD Policy Directive announced NJDEP's plan to collect NRD for groundwater and other resources, established a screening process, and informed RPs that the NJDEP would be using a generalized (and unpromulgated) formula to calculate and settle NRD.[4]

The NJDEP initiated over 100 NRD lawsuits from 2006 to 2008. While many of the lawsuits concerned relatively small operations and NRD demands, some were much larger in scope. For instance, in 2007, the NJDEP filed a statewide NRD lawsuit against nearly 50 defendants historically involved in the manufacture, blending and distribution of methyl tertiary butyl ether (MTBE), a former gasoline blending component, seeking damages for alleged injuries to all "waters of the State."[5] During Gov. Chris Christie's administration, from 2010 to 2018, no new NRD cases were filed, but NJDEP continued to take an aggressive approach to prosecuting pending NRD litigation. During this time, the state recovered over $500 million in NRD judgments and settlements—a significant source of revenue for the NJDEP and state.

One of the largest of these settlements related to the Bayway/Bayonne litigation matter[6] in which the NJDEP advanced a novel theory that the Spill Act's NRD scheme applied retroactively over a century,[7] and argued that any detectable contamination in a natural resource was a *de facto* injury constituting a complete, 100% loss in natural resource value and services. As part of the 2015 settlement, the responsible party, ExxonMobil, paid $225 million while retaining its obligation perform the remediation and cleanup activities required by the NJDEP; however, the settlement was not without controversy. First, certain environmental groups and community members advocated that the settlement should have been higher since the state had initially sought $8.9 billion in damages. Second, the state's budgeting of the proceeds would see $50 million being set aside for "resource restoration projects," with the rest being deposited into the state's general fund. Another $50 million reportedly went to pay the state's out-of-state counsel. In 2017, an amendment was added to the state Constitution to require the state to use NRD recoveries to repair, replace, or restore damaged natural resources in the vicinity of where the natural resource injuries occurred.[8]

The NRD Litigation Pivot in 2018

In 2018, after nearly a decade of no new NRD lawsuits, New Jersey's Attorney General and the NJDEP announced a "New Day" in environmental enforcement and initiated six new actions on Aug. 1, 2018—three of which involved NRD claims. Political pressure had been mounting for the state to restart NRD litigation, but there was still no publicly-open and transparent effort to regulate and assess NRD as done by the federal government. Instead, the government continued to maintain a litigation-based approach, initiating over 20 NRD lawsuits between 2018-2023. The uptick in NRD cases came hand-in-hand with a focus on EJ matters, with the state filing more than 50 EJ lawsuits since 2018. Most of the NRD lawsuits are specific to individual sites, as opposed to statewide or multi-site actions; however, some lawsuits target multiple parties for alleged wide-spread contamination.[9] Moreover, the state continues to rely almost exclusively on outside counsel working on a contingency fee basis, which stirs further controversy.

Generally, responsible parties are "encouraged to contact the Office of Natural Resource Restoration to explore voluntary settlement" of their NRD liabilities and avoid litigation.[10] The above-discussed lawsuits are seemingly intended to "send a message" to the regulated community—i.e., voluntarily approach ONRR to settle NRD or face the prospect of an NRD lawsuit that seeks a much larger damages award. In a press release regarding a recent voluntary NRD settlement, the former NJDEP Commissioner and the New Jersey Attorney General touted their "robust [NRD] litigation program," which ***"brings everyone to the [settlement] table – even outside of those pending lawsuits."***[11]

While the ONRR promises a "discount" for those who come forward to settle their NRD liability, the department provides little clarity on how it will assess or value such NRD liability. Hence, RPs are often unable to meaningfully plan and account for potential NRD settlements, which deters some RPs from initiating settlements for fear that the liabilities will be unpredictably high.

To help facilitate NRD settlements, and to address industry's concerns, New Jersey State Sen. Bob Smith convened a NRD Taskforce in 2018 to discuss potential NRD regulations and objective standards for evaluating and calculating recoverable NRDs. The Task Force was comprised of the regulated community, NRD practitioners and environmental advocacy groups.[12] Despite being invited and present at the meetings, NJDEP officials declined to meaningfully participate in the discussion and kept a low-profile during sessions. Meanwhile, public dissatisfaction with the NRD process—and with settlement terms—continued to grow.

Local Governments and the Public Become More Vocal

One instance of public dissatisfaction was the 2023 settlement related to the Ciba-Geigy Superfund Site in Toms River.

As part of the settlement, the responsible party, BASF, was required to permanently preserve approximately 1,000 acres to protect groundwater resources in perpetuity, compensate the public for groundwater injury, and compensate the public for ecological injuries by designing and implementing nine restoration projects. The total investment for BASF would reportedly amount to approximately $35 million to $40 million, in addition to a $500,000 cash payment.[13] Despite the notice and comment period being extended twice to provide a total of 120 days—and some of the comments being incorporated into the settlement—many people felt that there was insufficient public outreach and engagement on the settlement arrangement. Still others felt the deal only benefited the NJDEP and/or insufficiently compensated the local community. The settlement was ultimately approved, but the prolonged negotiations delayed the start of the restoration.

Recent litigation settlements have faced similar challenges. For example, in May 2023, NJDEP, with the help of a mediator, negotiated a settlement agreement with responsible parties Handy & Harman and Cycle Chem to resolve NRD claims for historical contamination at a site in Montvale. However, the Bergen County municipality moved to intervene—objecting not to the proposed settlement payment, but the possibility that upwards of 43% of the $14 million in proceeds would go to outside counsel and the NJDEP's administrative fees (rather than the local community). Montvale argued that the 2017 constitutional amendment precludes the state from paying more than 10% of settlement to outside counsel. While the court denied Montvale's motion to intervene, Montvale was permitted to file an *amicus* brief opposing settlement. The proposed settlement offer was finally approved on May 16 for $14 million but the court did not express any opinion on the validity of Montvale's constitutional concerns.[14]

Similarly, another settlement matter, which would require the responsible party Solvay to pay $75 million for NRD and perform comprehensive remediation activities, along with other compensation payments, was announced in June 2023; however, concerns expressed by the local municipalities delayed the approval process for eight months. After prolonged discussions with the local community and government leaders, the NJDEP was only able to seek court approval for a revised settlement agreement in January. The settlement approval was further delayed by interventions and objections filed in February, but it was finally approved on March 6.[15]

Lack of Settlement Guidance—Until Now?

Thus, the question remains: has the "New Day" in environmental enforcement had the impact that NJDEP and the current administration envisioned? While certainly an effective and powerful enforcement tool, in reality, very few of the NRD settlements announced in recent years were voluntary—most involved litigation initiated during or prior to 2018. As noted, one reason for the limited number of voluntary settlements may be a lack of discernible and predictable NRD policy, which makes it difficult for companies to estimate and reserve for potential liabilities that, absent regulatory guidance, are not always quantified in a reliable and consistent fashion.[16] The lack of guidance similarly makes it difficult for courts to determine the fairness of proposed settlements. NJDEP's already strict cleanup standards require significant expenditures, and the absence of a known protocol for settlement may be deterring potential RPs from coming forward on their own and incurring potentially large NRD liabilities—or becoming a litigation target should negotiations fail.

The public's concerns, coupled with the industry's calls for more objective standards for NRD assessment, led the NJDEP to issue an Administrative Order 2023-08 (AO 2023-08) regarding Natural Resource Restoration Policy on March 14, 2023. The AO included a Natural Resource Restoration Policy, outlined a specific collaboration process for NRD Assessment and Restoration, and created a Natural Resource Restoration Advisory Council, which is required to make certain information public. The AO also directs the ONRR and the Contaminated Site Remediation and Redevelopment (CSRR) program to "establish protocols and procedures," and seeks to improve NJDEP's "policies and practices for voluntarily resolving potential NRD liabilities with responsible parties." While the AO sets laudable goals, it stops short of providing actual, implementable guidelines and does not change the process or ability for the NJDEP to instigate litigation to recover NRD. Today, nearly a year later, NJDEP has not issued any new guidance or written policy to help effectuate the AO's goals. The regulated community, local governments, and other stakeholders would benefit from the NJDEP building on this AO to provide more concrete and substantive guidance or regulations regarding NRD policies and valuation. ■

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5. In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, S.D.N.Y., No. To date, the state has collected more than $400 million in settlements from the MTBE litigation defendants, which remains pending today—17 years later. See, *e.g.*, casetext.com/case/nj-dept-of-envtl-prot-v-atl-richfield-co-in-re-methyl-tertiary-butyl-ether-mtbe-prods-liab-litig-8.
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7. *State v. Ventron*, 94 N.J. 473 (1983) was the first case to hold that certain aspects of Spill Act applied retroactively.
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Clients Best Served in Comprehensive Approach to Due Diligence in Transactions

By David Restaino

DAVID RESTAINO *has over three decades of experience in environmental compliance and litigation, and in evaluating risks associated with corporate and real estate transactions. He is a partner with Pierson Ferdinand LLP in Princeton.*

Performing environmental due diligence is not just about hiring the right consultant, reviewing the conclusions in a Phase I Environmental Site Assessment, or surfing a few government websites. Simplifying diligence to that level is risky. Instead, due diligence must factor in a client's needs, *i.e.*, the context of ***why*** the site review is being conducted. For this reason, the lawyer's due diligence toolbox should include, in addition to a standard assessment, issues not typically identified by environmental consultants.

Simply, someone may be interested in due diligence to know what is being bought, redeveloped, financed, or insured. As will be more fully discussed below, there are many considerations impacting due diligence. In every situation, it is best to confer with the client first about expectations—and about the topics for which a client may be unaware. Several considerations are addressed below.

The Due Diligence Period and Hiring Third Parties

One initial consideration is the time required to perform the diligence. While a 30-day period is common, it will often take longer unless some of the work commences before the period starts to run (which some clients are reluctant to do, until a deal

…[T]he retention of appropriate third-party experts should be addressed with the client. Typically, a client will hire the experts directly so that the client possesses all rights associated with negligent expert services, although there may be different considerations if litigation is involved, for example, cloaking of draft reports under the attorney work-product privilege.

"goes hard" upon contract execution). Whatever length the period is, typical activities include a site visit, review of government files, and the production of documents by the adverse deal party. Also, if the transaction includes a contingency for environmental sampling—often referred to as "Phase 2"—then the concept of a contingent extension of the due diligence period should be discussed to allow more time if a Phase 2 is recommended.

Next, the retention of appropriate third-party experts should be addressed with the client. Typically, a client will hire the experts directly so that the client possesses all rights associated with negligent expert services, although there may be different considerations if litigation is involved, for example, cloaking of draft reports under the attorney work-product privilege. Typical provisions in a consultant's retention letter include indemnities, liability limitations, and insurance protections—all which should be read carefully in case revisions are needed to protect the client. Moreover, great care should be exercised in relying solely upon a certificate of insurance (COI) since the standard ACORD Form COI states that the form itself is not binding upon the insurance carrier. Finally, using a licensed site remediation professional (LSRP) to conduct the environmental due diligence may be restricted so that the disclosure of any urgent environmental concerns, where required by law, can be managed by one party alone.

Reliance on Reports

Depending on the desired use of an expert's work-product, other entities such as lenders and insurers may want to rely on the final report. Many environmental consulting firms will provide a "reliance letter" so that other parties can rely on a report. However, there may be additional financial and insurance considerations needed to bring this to fruition.

The Environmental Assessment and its Legal Significance

A Phase I Environmental Site Assessment, or Phase I for short, is a property assessment governed by a standard drafted by the American Society of Testing and Materials (ASTM) and known as E 1527. A Phase I report will identify environmental issues that are more than of a *de minimis* concern, known as Recognized Environmental Conditions (RECs). The report may also identify Controlled RECs, for example, contamination that legally is encapsulated under an engineering control such as an asphalt cap, and Historic RECs. Typically, the report will include numerous appendices such as aerial photos, historic "Sanborn" fire insurance maps when available, flood maps, and a summary of government agency databases. Some of these attachments may require a more robust review.

To simplify a bit, a report that satisfies the federal Phase I standard can provide a person with defenses to federal liability—*e.g.*, innocent purchaser protection and bona fide prospective purchaser status—provided the Phase I includes certain minimum deliverables and opinions.

A Phase I report does not, however, provide innocent purchaser protection under New Jersey law. To qualify for the state law protection, a person must obtain a Preliminary Assessment Report that satisfies regulations and guidance overseen by the New Jersey Department of Environmental Protection. Many consulting firms in New Jersey can prepare one report that satisfies both the federal and state requirements for a limited extra cost.

Some clients will want to rely on older environmental assessment reports rather than hire a new firm to update an earlier diligence project. While doing so is always a business decision, the choice may render a client ineligible for the aforementioned legal protections. For example, a Phase I report is only valid for up to 180 days, after which time the report needs to be updated to retain innocent purchaser eligibility.

Examples

Some real-world examples, below, illustrate how different perspectives can

result in different areas to highlight during a diligence review.

- Normal exclusions in a Phase I report include lead paint and asbestos-containing building materials, and mold. Some or all these issues may be relevant if a building is to be demolished or renovated.
- If the project involves redevelopment near a stream, then the flood map included in a Phase I's appendix may be a critical document even though flood zones normally are a non-scope item under the ASTM Phase I and Preliminary Assessment standards.
- When residential redevelopment is involved on a site where prior uses included the agricultural use of pesticides, it may be appropriate to determine if any elevated pesticide levels would exist near future homes.
- Similarly, for residential developments, sites that include wetlands—or which have wetlands on adjacent properties where the wetlands transition area extends beyond the property line and onto the subject site—may require further, site-specific screening. On a connected note, the redevelopment of a property subject to the Coastal Area Facility Review Act could impose limitations that are critical to know prior to acquisition. The same is true for any local land use regulation.
- In the redevelopment context, further scrutiny of previously remediated soil contamination may be in order. In some circumstances, the NJDEP will allow compliance averaging as a tool that allows for some contaminated soil to remain on a site without engineering controls. Or there may be some contamination that is encapsulated beneath an asphalt cap. While these are acceptable forms of remediation, they can cause issues when a site's redevelopment will involve the generation of soil that requires off-site handling. More specifically, contaminated soil that has a "right to exist" on the site may, once removed, require expensive handling as a hazardous substance. Clients need to consider how these factors may play out during redevelopment to avoid surprise cost increases that were not itemized in the project budget or its financing.
- If the diligence relates to a transaction involving the purchase and sale of an operating industrial facility, then the client may be very interested in the existing environmental permits allowing for operation of that facility. It is not uncommon for a facility to be operating without all necessary permits, unknowingly, and a typical environmental assessment will not address the permits at all. In such situations, it may be advisable to bring on third parties with expertise in, for example, air permitting.
- Also, depending on the nature of the acquisition—a stock purchase, or even an asset purchase under certain circumstances—a purchaser should be wary of a predecessor's off-site disposal of hazardous substances. The purchaser may inherit environmental liability for tail-end liability risks associated with the disposal activities.
- Certain industrial establishments must comply with the Industrial Site Recovery Act (ISRA) and its supporting regulations, when a triggering event occurs. Environmental due diligence that includes some review of ISRA's applicability to a transaction is critical.
- Finally, some discussion of emerging contaminants, such as per- and polyfluoroalkyl substances (PFAS), may be appropriate under the circumstances, for example, if the site had experienced a fire that was extinguished with foam that may have contained PFAS.

Online Databases

Tacking to a different focus altogether, government agencies make information available in online databases. These would include the NJDEP's "Data Miner" site, which allows for the downloading of a variety of site remediation documents and inspection reports, among other things. The United States Environmental Protection Agency also has an online database program called Enviro Facts. In addition, the NJDEP has available several online mapping programs for reviewing a site's history and its regulatory status under a variety of environmental programs like the Flood Hazard Area Control Act, the Freshwater Wetlands Protection Act, and overburdened communities subject to the Environmental Justice Law. Whether it is appropriate to review these online or mapping tools will depend on the nature of the due diligence project.

Final Thoughts

Although beyond the scope of this article, some of the foregoing diligence issues can crop up concerning estate planning and the disposition of marital assets. Certain clients should also consider reviewing a seller's insurance portfolio to better understand what risks have been muted by insurance.

In sum, what you don't know can hurt you. ■

‘Forever Chemicals’ and the Law

Broadening PFAS Regulations and Legislation

By Dawn Monsen Lamparello, B. David Naidu, and Emily M. Poniatowski

Federal and state efforts to regulate per- and polyfluoroalkyl substances (PFAS) have been at the forefront of environmental legal issues in recent years. PFAS are synthetic chemicals found in thousands of industrial and consumer products, such as nonstick cookware, fire-resistant foams, coatings, food packaging, and clothing. PFAS are commonly referred to as “forever chemicals” as they do not break down easily and build up in the environment over time.

Numerous statutes authorize the EPA to regulate contaminants, including PFAS, under multiple regulatory schemes. These include the Safe Drinking Water Act (SDWA); Emergency Planning and Community Right-to-Know Act (EPCRA); Toxic Substances Control Act (TSCA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and Clean Water Act.

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Public concern over PFAS began in the 1990s, but state and federal PFAS regulation and legislation have since expanded significantly in recent years. While scientific understanding of PFAS toxicity continues to evolve, U.S. Environmental Protection Agency (EPA) research suggests that exposure to certain PFAS may cause adverse health effects, such as decreased fertility, developmental delays, or increased risk of certain cancers.[1] The Biden administration made a specific commitment to target PFAS in the EPA's "PFAS Strategic Roadmap."[2] Under the roadmap, federal PFAS regulation increased significantly in 2023, with few signs of slowing down this year.

Existing Notable Regulations and Legislation

Numerous statutes authorize the EPA to regulate contaminants, including PFAS, under multiple regulatory schemes. These include the Safe Drinking Water Act (SDWA); Emergency Planning and Community Right-to-Know Act (EPCRA); Toxic Substances Control Act (TSCA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and Clean Water Act.

SDWA: Drinking Water Health Advisories

The SDWA requires the EPA to establish and enforce drinking water standards for public water systems. In 2009, the EPA published a provisional Drinking Water Health Advisory for perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA), two of the most common PFAS, under the SDWA. Health Advisories provide information on a contaminant's potential effects on human health, as well as analytical methodologies and treatment technologies for drinking water system operators. After several years of monitoring, the EPA issued Lifetime Drinking Water Health Advisories[3] for PFOS and PFOA in 2016. The advisories, while not enforceable standards, suggest a combined concentration level of no more than 70 parts per trillion (ppt), as the EPA determined that concentrations at this level (or lower) offer a lifetime margin of protection from adverse health effects for all individuals exposed to PFOS and PFOA in drinking water. This led many states to test for PFAS in public water systems, and in 2018, New Jersey became the first state to establish enforceable maximum contaminant levels (MCLs) for the presence of contaminants in drinking water for PFOA and PFOS, at 14 ppt and 13 ppt respectively. Over 20 states now have MCLs for certain PFAS, many set at levels far below 70 ppt. In December 2021, the EPA finalized a rule under the SDWA requiring data collection of concentrations of 29 different PFAS in

public water systems and issued interim Drinking Water Health Advisories for PFOA and PFOS in 2022, pending final national primary drinking water standards for certain PFAS.[4]

EPCRA: Revised Toxics Release Inventory Reporting and Supplier Notification Requirements

The EPA's Toxics Release Inventory (TRI), established under Section 313 of EPCRA, requires businesses to submit annual reports of releases of certain chemicals that may pose a threat to human health and the environment. The National Defense Authorization Act for Fiscal Year 2020 added 172 PFAS to the TRI. The EPA initially set a reporting limit for PFAS at 100 pounds per year and provided a *de minimis* exemption for small concentrations of certain chemicals. The EPA expanded the TRI list to contain 196 PFAS for reporting year 2024.[5]

In October 2023, the EPA issued a final rule modifying TRI reporting requirements for PFAS. The rule designates all PFAS on the TRI as "chemicals of special concern" (CSCs) as of 2024. By reclassifying PFAS as CSCs, the EPA eliminated the *de minimis* reporting exemption for TRI-listed PFAS. All concentrations of PFAS, no matter how small, are reportable when making TRI threshold determinations and release calculations. This is significant, since many PFAS exist in very low concentrations in mixtures and may not have been reported under the prior exemption. The rule also eliminates simplified reporting options for PFAS and requires a full accounting of releases, waste management pathways, and individual reports for each chemical. Additionally, facilities must report the precise amount of PFAS released per pathway on their reports rather than using estimated range codes. Lastly, the rule significantly modifies EPCRA supplier notification requirements. Impacted suppliers must now disclose TRI-regulated PFAS at any and all concentrations in their products to downstream purchasers. Suppliers have 30 days to provide or correct supplier notifications once they become aware of a TRI-regulated chemical in a product previously sold to a TRI-regulated customer. Similar to the revised TSCA reporting requirements, the amended TRI reporting rules will likely generate significant compliance costs for a wide range of entities.

TSCA New Chemicals Program: Revised Framework and Reporting Requirements

Under TSCA, the EPA evaluates and sets reporting, testing, and recordkeeping requirements for new and existing chemical substances and mixtures. In June 2023, the EPA released a new framework for conducting risk assessments for new PFAS or new uses of PFAS under the TSCA New Chemicals Program. Under the framework, the EPA will review and take appropriate action for new PFAS or significant new uses of existing PFAS through pre-manufacture notices and significant new use notices. The framework is a two-step process. In step one, the EPA must determine if the substance under review falls within the chemical definition of PFAS. If so, the EPA will review all reasonably available data to determine if the PFAS is a persistent, bioaccumulative, and toxic (PBT) chemical. In step two, if the EPA determines the substance is a PBT PFAS, it then analyzes the chemical's potential environmental and human health risks and acts based on the anticipated level of risk associated with the new chemical or significant new use. Prescribed courses of action range from no use restrictions whatsoever to prohibitions on any manufacture or use of the chemical. Though the framework is not "enforceable" per se, as it is not an official EPA regulation authorizing penalties or other enforcement measures, it could have significant implications for manufacturers who use PBT PFAS in their products due to these heightened levels of administrative review.

In October 2023, the EPA finalized extensive reporting and recordkeeping requirements for PFAS under TSCA, as authorized by Congress in the National Defense Authorization Act for Fiscal Year 2020. The rule requires certain individuals or entities to submit reports to the EPA for each year from 2011 to present in which they manufactured or imported PFAS for a commercial purpose. This includes the coincidental manufacture of PFAS as byproducts or impurities, as well as manufacture for use in product research and development. Entities that only process, distribute, use, or dispose of PFAS received domestically do not need to report under the rule, so long as they have not manufactured (or imported) PFAS for a commercial purpose. The rule defines PFAS broadly, using a structural definition rather than a list of covered substances, and will likely generate large compliance costs for impacted manufacturers and importers. The EPA directs impacted entities to report all PFAS-related information that is "known to or reasonably ascertainable by" them, which is further defined as "all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control or know."[6] The Rule vastly expands the number of manufacturers subject to TSCA reporting requirements, with very few exemptions. Notably, manufacturers or importers of products that contain PFAS must now report under the rule. Additionally, the rule does not set a *de minimis* reporting threshold; any amount of PFAS manufactured or imported during the relevant timeframe is reportable. Reporting is on a per chemical per year basis and reports generally will be due to the EPA in May 2025.

Other federal agencies have taken initiative against PFAS, too. In 2020, the Food and Drug Administration (FDA), in collaboration with several manufacturers, announced a voluntary phase-out of certain PFAS that can be found in food

To date, about a dozen states, including New Jersey, have enacted or are actively considering PFAS-related legislation, and several states have mandated various PFAS product bans. While each state law is somewhat unique, these laws generally have two common elements: (1) broad bans of commonly used household products that contain PFAS; and (2) notification requirements for products with intentionally added PFAS, accompanied by scheduled market phase-outs, unless the product is specifically excluded by regulation.

packaging.[7] The FDA also tests and reports on PFAS levels detected in certain foods.

Legislation

Congress has also been focused on PFAS management. The Bipartisan Infrastructure Investment and Jobs Act of 2021[8] allocated $10 billion in new government funding toward addressing PFAS and other emerging contaminants via improved drinking water, updated wastewater and storm water infrastructure, and upgraded drinking water treatment systems. The Preventing Firefighters from Adverse Substances Act (or the PFAS Act) of 2022[9] requires the Department of Homeland Security to develop guidance for firefighters and other emergency response personnel to follow regarding training, education, and best practices to protect themselves from PFAS exposure from firefighting foams and to prevent the further release of PFAS into the environment.

The National Defense Authorization Act for Fiscal Year 2023[10] requires the Department of Defense (DOD) to phase out personal protective firefighting equipment containing intentionally added PFAS by fiscal year 2027 and provides over a billion dollars dedicated to cleaning up contaminated military facilities and conducting PFAS-related research. Most recently, the National Defense Authorization Act for Fiscal Year 2024[11] requires the DOD to provide separate budget justification documents for department activities related to PFAS and directs the Government Accountability Office to submit reports on the DOD's ongoing testing and remediation of current or former military installations that have PFAS contamination. Earlier versions of the National Defense Authorization Act for Fiscal Year 2024 contained more significant provisions, including a proposed prohibition on DOD procurement of PFAS-containing products, but these were left on the cutting room floor.

Recent and Anticipated Actions

The EPA plans to continue regulating PFAS in 2024 and beyond, and recently finalized long-awaited national drinking water standards for six PFAS under the SDWA. MCLs are set at 4.0 ppt for PFOA and PFOS and at 10 ppt for PFHxS, PFNA, and HFPO-DA (also known as GenX chemicals). A unitless Hazard Index of 1.0 applies to mixtures containing two or more of PFHxS, PFNA, PFBS, or GenX chemicals.[12]The Hazard Index is calculated using a sum of fractions and compares the level of each PFAS measured in the water to the highest level below which there is no risk of adverse health effects. The EPA also recently issued a final rule[13] designating two PFAS (PFOA and PFOS) as hazardous substances under CERCLA, though members of Congress have proposed amendments[14] to CERCLA to create industry-based exemptions for PFAS liability as well as a proposed exemption for certain water systems that dispose PFAS.[15] The EPA also plans to start the rulemaking process to codify PFAS testing methods under the Clean Water Act. In February 2024, the EPA published two proposed rules under the Resource Conservation and Recovery Act (RCRA). The first rule would designate certain PFAS (including PFOA and PFOS) as "hazardous constituents" under RCRA, while the second rule would expand the wastes currently subject to corrective action requirements under RCRA's definition of "hazardous waste" to include qualifying releases of PFAS.

To date, about a dozen states, including New Jersey, have enacted or are actively considering PFAS-related legislation, and several states have mandated various PFAS product bans. While each state law is somewhat unique, these laws generally have two common elements: (1) broad bans of commonly used household products that contain PFAS; and (2) notification requirements for products with intentionally added PFAS, accompanied by scheduled market phase-outs, unless the product is specifically exclud-

ed by regulation. Maine was one of the first states to enact PFAS legislation in 2019, and many other states have enacted or hope to enact "copycat" laws. These laws and their regulations, while seemingly simple, will have widely felt implications, including in New Jersey.

The New Jersey League of Conservation Voters recently announced its "Common Agenda for the Environment" for the current legislative session.[16] One portion of this five-part plan involves prioritizing safer drinking water throughout the state, via the elimination of PFAS and microplastics. The group estimates that New Jersey's water infrastructure requires at least $30 billion in investments over the next 30 years to replace lead pipes and remove PFAS from drinking water. A bill pending in the New Jersey Legislature, titled the "Protecting Against Forever Chemicals Act,"[17] proposes to phase out the sale of cosmetics, carpets, cookware, fabric treatments, and clothing containing intentionally added PFAS. The bill also proposes to increase labeling transparency for PFAS-containing products.

Early this year, the New Jersey Legislature passed a bill[18] requiring the New Jersey Department of Environmental Protection (NJDEP) to consult with the Drinking Water Quality Institute and conduct a study on the current regulation of PFAS in drinking water. This study will also include an assessment of the feasibility of setting an MCL applicable to all PFAS, or to certain subclasses of PFAS, rather than separate MCLs for each individual PFAS. Gov. Phil Murphy also signed a bill[19] into law that will prohibit the use of PFAS-containing firefighting foams throughout the state, following a two-year grace period. The law allocates $250,000 to the NJDEP to create a grant program to assist small fire departments with disposing of these foams.

Conclusion

Last year was an active year for PFAS regulation across the country, with more to come in 2024. Public entities and businesses across many industries may now find themselves subject to updated regulatory requirements designed to minimize PFAS, and compliance will likely be costly. As public attention on PFAS increases and scientific understanding further develops, the EPA is likely to propose even more stringent PFAS regulations and environmentally active states like New Jersey are likely to follow suit. ■

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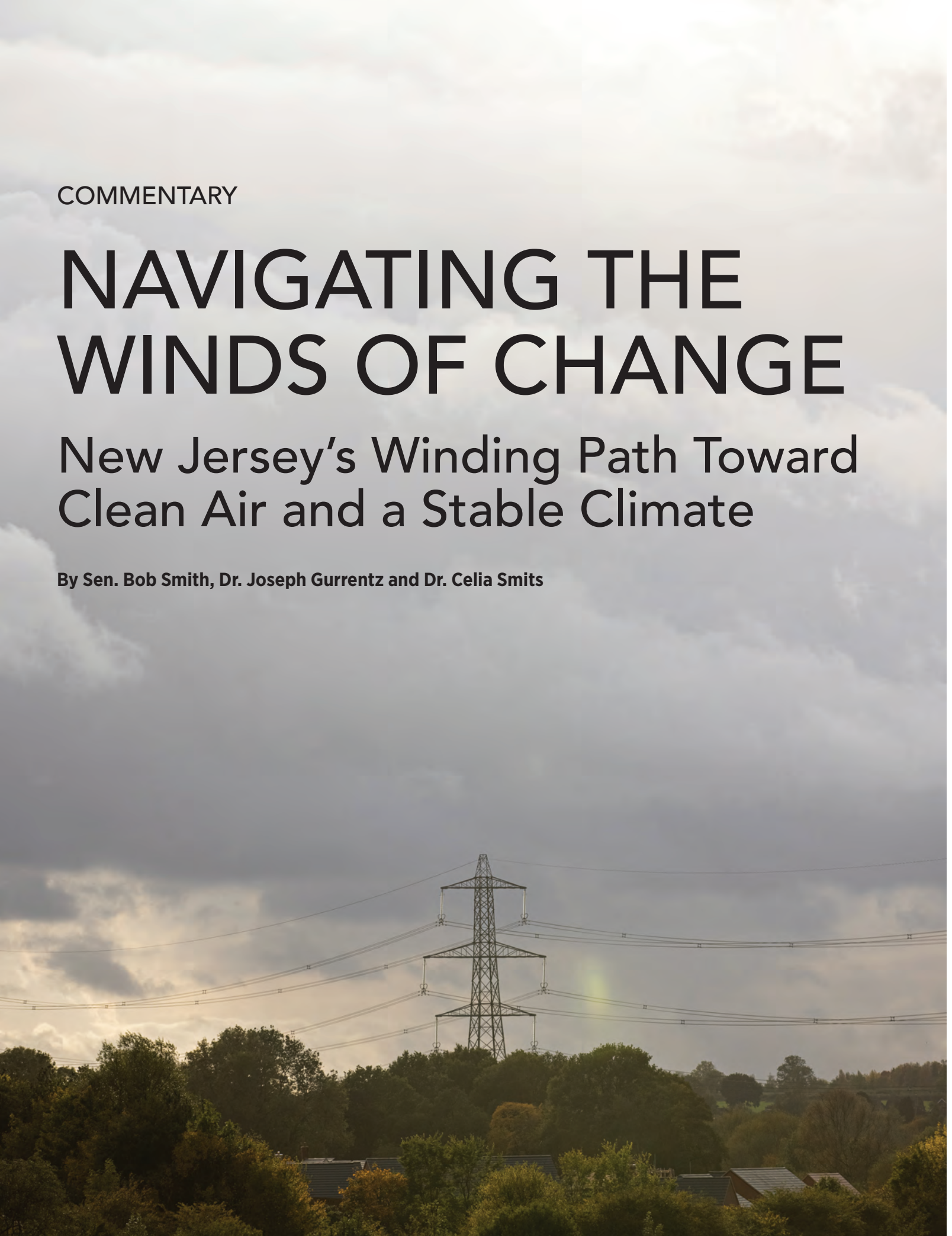
COMMENTARY

NAVIGATING THE WINDS OF CHANGE

New Jersey's Winding Path Toward Clean Air and a Stable Climate

By Sen. Bob Smith, Dr. Joseph Gurrentz and Dr. Celia Smits



In June 2023, Canadian wildfire smoke blanketed much of the northern U.S., blotting out the sun and casting an orange haze over much of New York and New Jersey. During its peak, the air quality was so poor that standing outside was as bad for one's health as smoking seven cigarettes a day (and in some ways worse!).

Unprecedented climate events like this underscore the urgency of New Jersey's policy responses to climate change. The impacts of climate change are here, now, and undeniable. In response, the New Jersey Senate Environment and Energy Committee has spent the past year focusing on developing legislation aimed at cleaning up New Jersey's air and environment to ensure that we have clean air to breathe while simultaneously taking steps to fend off the worst effects of climate change.

In doing so, the committee has taken a multi-faceted approach, considering legislation with topics ranging from food waste management to the stewardship of New Jersey's natural carbon-sequestering forests. While progress is being made toward a variety of policy goals in this space, this year we were pleased to have achieved particular success on the passage and enactment of clean energy and clean transportation policy.

Considering that the top two most significant sources of greenhouse gas (GHG) emissions in the U.S. are the transportation and electricity generation sectors, policies focused on cleaning up these sectors stand to have the greatest effect toward decreasing air pollution, improving public health, and mitigating the state's climate impacts. These policies also grant access to millions in federal dollars and stand to create thousands of new in-state jobs.

Tackling Mobile Sources of Air Pollution

In August 2021, President Joe Biden set a target for half of all new vehicle sales to be zero emissions vehicles (ZEVs), a category that includes electric vehicles (EVs), by 2030. These rules are projected to rapidly accelerate markets for EVs, ranging from passenger vehicles to electric buses and trucks. To help effectuate this goal, California, in cooperation with 14 other states including New Jersey, adopted the Advanced Clean Cars II and the Advanced Clean Trucks Rules.

SEN. BOB SMITH *represents the citizens of New Jersey's 17th Legislative District. Having served in the state Legislature since 1986, currently as chair of the Senate Environment & Energy Committee, Bob is considered one of New Jersey's leading environmental lawmakers.*

DR. JOSEPH GURRENTZ *is an experienced scientist and policy analyst who has served as aide to the New Jersey Senate Environment & Energy Committee and Senate Labor Committee since 2021. Joseph's background in chemistry focused on solar energy generation, hydrogen production, and energy storage applications.*

DR. CELIA SMITS *is an Eagleton Science and Politics Fellow in the New Jersey Senate Democratic Office, and co-aide to the Senate Environment and Energy Committee. Celia received a Ph.D. in Molecular Biology from Princeton University.*

At-home EV charging is only half the battle…. *The New York Times* reports that software glitches, payment errors, and physical damage have resulted in widespread issues with the reliability of commercial EV charging stations. In fact, a March 2022 Cool the Earth study found that 23% of the San Francisco Bay Area's 657 public charging stations were nonfunctional at the time.

These rules require that all new cars sold in New Jersey must be ZEVs by 2035. With this aggressive target in place, state policymakers must also provide mechanisms to ease the transition to ZEVs. Since 2020, New Jersey has provided over $120 million in incentives for the purchase or lease of EVs. This year, the Legislature passed several new laws supporting this work.

New laws, for example, take steps to address one of the primary roadblocks to widespread EV adoption: range anxiety. Understandably, drivers want the confidence that they will reach their destinations without delays from long waits or service interruptions at charging stations. This is why the state Legislature enacted a law that clarifies requirements for multi-unit dwellings to install EV charging stations in new and renovated residential parking areas (2022–23 session bill S3490). This guidance will help ensure that those living in dense communities, including renters, have access to EV charging at their residences.

At-home EV charging is only half the battle though. *The New York Times* reports that software glitches, payment errors, and physical damage have resulted in widespread issues with the reliability of commercial EV charging stations.[1] In fact, a March 2022 Cool the Earth study found that 23% of the San Francisco Bay Area's 657 public charging stations were nonfunctional at the time.[2]

To tackle this issue, New Jersey passed a law requiring all EV charging equipment to comply with a 97% "uptime" requirement in order to receive state-level incentives (2022–23 session bill S3102). This new requirement is in alignment with similar requirements established in the National Electric Vehicle Infrastructure Formula Program. Another new law will support the deployment of public EV charging depots powered by renewable energy (2022–23 session bill S3224). With these laws in place, the state can more effectively ensure that EV charging stations will be abundant and available to fulfill the public need.

Finally, once the batteries that power EVs reach the end of their useful lives, they need to be safely recycled, reused, or disposed of. These batteries are made with rare, expensive materials that are primarily produced overseas, so ensuring that these materials are reused or recycled in the U.S. stands to bolster the domestic EV and EV battery manufacturing supply chain.

These efforts are supported by billions of dollars that the federal government has made available for domestic battery manufacturing through the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, and the Inflation Reduction Act. New Jersey recently passed a first-in-the-nation Electric and Hybrid Vehicle Battery Management Act (2022–23 session bill S3723), which requires that producers of EV batteries come up with a plan to manage these batteries throughout their lifespan. The state is now poised to leverage this federal money to support in-state battery recycling and remanufacturing efforts. This work will ensure that the critical materials that constitute EV batteries are recirculated throughout the domestic economy, decreasing reliance on imported goods while minimizing hazardous landfill waste.

Despite all of this progress, many critical opportunities to clean up the state's transportation sector remain. This is particularly true for hard-to-decarbonize sectors, like medium- and heavy-duty vehicles. While emissions from these vehicles are often concentrated in industrial zones, they disproportionately impact communities that live in close proximity—often low-income and minority communities whose voices are too often neglected in Trenton.

In the new legislative session, the Senate Environment and Energy Committee plans to consider legislation aimed at

tackling transportation emissions at the source: the fuel. Specifically, a newly introduced Low Carbon Transportation Standard in New Jersey would develop a credit and deficit system designed to ensure that the average GHG intensity of transportation fuels in the state decreases over time (2024–25 session bill S2425). In short, the bill would set a carbon intensity threshold, which is a number that describes the total amount of GHGs produced by the manufacturing and use of a fuel, and that threshold would be set to decrease over time. The bill would then provide financial incentives to generators of transportation fuels whose operations are below the threshold. Those that operate above the threshold would be penalized.

This is an ambitious bill, and it's not the only clean transportation proposal this session. Incentives for fleet vehicle electrification are also on the table (2024-25 session bill S210). It's going to take cooperation and coordination between many diverse interests to get this right, including input from industry, labor, environmental groups, and groups representing historically marginalized communities.

Clean Electricity for a Clean Conscience

To maximize clean air and emissions benefits, the state must also support the deployment of clean electricity to power our clean transportation sector. Fortunately, we are off to a great start. Currently, about half of the state's total electricity comes from a combination of zero-emissions nuclear and solar energy. Most of the rest of the state's electricity comes from natural gas though, so there is room to improve.

Passing legislation to decrease the carbon intensity of the state's electricity generation sector has always been, and will continue to be, a top priority of the Senate Environment and Energy Committee. Thanks to the alignment of the committee's goals and those of Gov. Phil Murphy, the state has made consistent progress in this arena. In the past legislative session alone, the Legislature enacted, and Murphy signed, new laws that will support the deployment of hundreds of megawatts of new solar energy resources and increase access to the benefits of solar energy for dense urban areas and local governments.

On Feb. 15, 2023, Murphy also signed Executive Order 315, requiring that 100% of New Jersey's electricity come from clean energy sources by 2035. This is one of the most aggressive clean energy goals in the country.

In the previous legislative session, progress was made on codifying this 100% clean electricity goal via the development of a clean electricity standard (CES) bill similar to the state's existing renewable portfolio standard (RPS). Under the bill, generators of clean electricity would receive a certificate for each megawatt hour of clean energy that they produce, and electric utilities would be required to purchase a certain number of certificates each year (2022–23 session S2178).

Several months of public discussion and stakeholder engagement shaped and reshaped this bill. Discussions involved stakeholders such as union labor, energy industry representatives, electric and gas utilities, clean energy activists, and environmental justice stakeholders, a wide variety of groups that sometimes have conflicting needs. While consensus on a final draft has not yet been reached, the work has resulted in the development of strong labor protection provisions, limits

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on co-pollutant emissions, and new permit compliance requirements for municipal solid waste incinerators. A reintroduced bill, S237, will be developed further in the new session.

While it's important to be firm in our support of the clean electricity transition, taking a stance against climate change and air pollution also requires holding fossil fuel companies accountable. One powerful step that the state could make would be to divest its pension and annuity funds from the 200 largest publicly traded fossil fuel companies (S198). Another triumph would be passing an amendment to the state constitution prohibiting the construction of new fossil fuel power plants (SCR11).

Strength Training the Electrical Grid

While often overlooked, a robust, resilient, and secure electrical grid is another critical piece of the puzzle supporting the state's clean air and emissions reduction policies. New Jersey's aging electrical grid is held together by the equivalent of toothpicks and duct tape. Blackouts during severe weather events are commonplace. New solar projects wait to come online in years-long interconnection queues. These issues need to be resolved so that the grid is ready to accommodate increasing electricity demand and changing load profiles as more EVs and intermittent renewable energy sources interconnect. This is work that should have been done years ago, but the second-best time to get started is today.

Grid modernization broadly means employing policies that improve the resiliency, reliability, and connectivity of electrical infrastructure, in concert with developing systems that allow for more rapid development and widespread adoption of advanced tools and technologies. This work paves the way for new distributed energy resources (DERs), such as residential solar and energy storage systems, to come online and provide their many benefits to both electricity customers and suppliers. The Senate Environment and Energy Committee has recently contemplated numerous policies in this space, but the complexity of the subject matter has made progress slower than desired.

At least two grid modernization bills passed into law this past legislative session. One of these new laws allows homeowners to install meter collar adapters that can isolate a customer's electrical load from the grid to access home-generated backup power in the event of a blackout (2022–23 session bill S3092). The other will support a study to determine the feasibility, marketability, and costs of implementing large-scale geothermal heat pump systems—like the one recently deployed by Princeton University (2022-23 session bill S3793). This is a good start, but at least five other grid-focused bills stalled last session before passage.

These include bills that would have provided incentives for energy storage systems (2024–25 session S225), streamlined DER interconnection standards (2024-25 session S212), and supported systematic planning for the increased deployment of DERs (2024–25 session S245). This is not to say that these initiatives are dead in the water. Rather, the Legislature will need to work even more closely in concert with state regulatory agencies to ensure that executive and legislative approaches are in alignment.

The right legislation will enable the state to unlock hundreds of millions of federal dollars that Congress and the Biden Administration have made available to support grid modernization. 2024–25 session S258 would appropriate $300 million in state money to support grid modernization, drawing an additional $200 million in federal funds. Injecting half a billion dollars to bolster the electrical grid would present enormous labor and workforce development opportunities while supporting the transition to electrified transportation and the broad deployment of clean electricity that will power our increasingly electrified economy.

Conclusions

Cleaning up New Jersey's air is a complex and multi-faceted goal. While clean transportation and clean electricity policy are primary focuses of the state's climate change mitigation goals, reducing air pollution and GHG emissions will take everything from expanding recycling infrastructure for plastic packaging and food waste to protecting New Jersey's natural carbon-sequestering forests from the threats of overdevelopment and invasive species.

This legislative session, bills are on deck that would, for example, establish forest stewardship plans for publicly-owned forests (S2424), take steps to reduce the climate impacts of food waste (S200, S255, S2426, SR14), and require greater transparency and product stewardship out of plastic packaging manufacturers (S208, S224). These issues touch on every person in New Jersey, and our actions will determine how other states respond.

New Jersey is proud to be a leader on all angles of clean air policy. But we must not forget: we are on a deadline! The impacts of climate change and air pollution will not wait for us. We must take action to protect New Jersey now. ■

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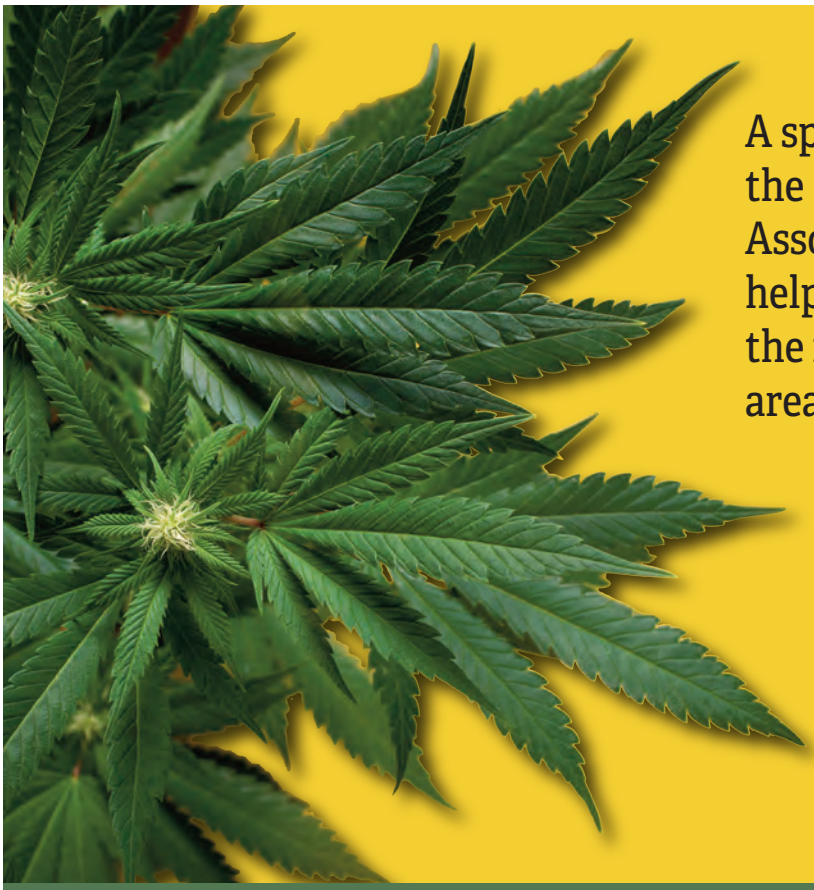

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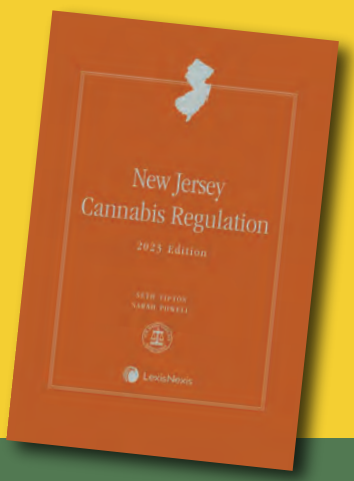

New Jersey Cannabis Regulation

by Seth Tipton and Sarah Powell

New Jersey Cannabis Regulation is the only book of its kind focused on New Jersey law, written by lawyers who are active in the Cannabis Bar. Use the authors' first-hand experience to learn about medical and recreational marijuana laws and regulations as it is interpreted in New Jersey courts. It addresses common issues and analyzes the principles and applications of cannabis regulations in New Jersey. It is clearly written and offers expert insight on the licensing of both recreational and medical marijuana dispensaries, civil liability under New Jersey law, the impact of federal law, as well as workplace and other compliance issues for growers, retailers, and wholesalers.

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ANNUAL MEETING AND CONVENTION

2024 RECAP

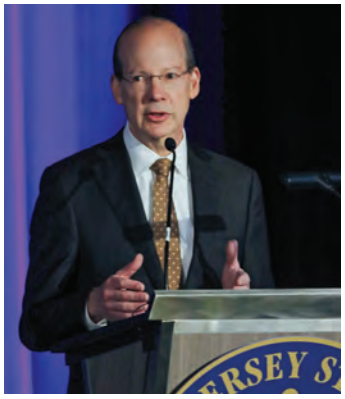
Last month, the New Jersey State Bar Association wrapped up another spectacular Annual Meeting and Convention in Atlantic City, the premier event of the state's legal community. Lawyers, judges, paralegals, clerks, law students and other professionals from around New Jersey descended on the Borgata Hotel Casino & Spa for an unforgettable three days of educational programming, networking and fun with colleagues. By the numbers, this year's conference welcomed 3,036 total attendees, who earned 34,742 CLE credits across 107 seminars and took part in dozens of receptions and business meetings. Thanks to everyone who made the 2024 Annual Meeting and Convention one for the ages. We hope to see you next year.

PHOTOS BY AMANDA BROWN AND JIM BECKNER

Check Out Some Highlights from the Week


New President, Slate of Officers Installed

William H. Mergner Jr. took the oath of office on May 16 as president of the NJSBA for the 2024–2025 term, assuming leadership over the state's largest organization of legal professionals. New Jersey Supreme Court Chief Justice Stuart J. Rabner swore in Mergner, along with the NJSBA's Executive Committee and Board of Trustees.




State of Judiciary Speeches Cover Proposed Shake-Up in Appellate Division Appointments, Rise in Filings

New Jersey's top two jurists addressed rising caseloads, improving attorney well-being and a proposal that would overhaul the appointment process for the state Appellate Division at the annual States of the Judiciary session.

Former NJSBA President Talks Finding Your Path in the Law

Career planning and setting professional goals are a key part of defining your legacy in the law. Former NJSBA President Jeralyn L. Lawrence led a panel on the importance of finding purpose as an attorney and how that realization guided their career paths.


NJSBA Annual Meeting and Convention Kicked Off With an AI Panel

Business opened at the Annual Meeting and Convention with a thoughtful panel discussion about AI, its impact on the law and how the technology will change the work of attorneys. Keynote speaker Dr. Chris Mattmann, an international expert in AI, opened the session with a 50-year history of AI's evolution and its legal, social and ethical impact.

Shining a Light on the Ethics System

Understanding the attorney and professional ethics system in New Jersey is key to avoiding ethics trouble. A panel of experts at "Ethics, The Court and The Bar—A Comprehensive Look at How the Ethics System Works" offered insight into how the ethics process and the Judiciary's disciplinary system works and various Court agencies tasked with oversight.

Appellate Advocacy Insights

Do oral arguments matter? State and federal appellate jurists explained why.

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Karol Corbin Walker, Esq.

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Wednesday, July 10

All in on AI—Microsoft's Brave New World

Everyone is excited about AI. What is Microsoft doing that will transform law firms? Our panel discusses what's coming from Microsoft and how it affects software you use and impacts legal services: Windows, Office, and Microsoft's online tools. Live demos where possible!

Wednesday, Oct. 9

Microsoft Word and PDFs; Properly Prepare Documents for E-Filing

This webinar teaches you the basics of preparing a Word document for e-filing, preparing PDFs for e-filing, combining and reducing the size of PDFs, bookmarking, metadata removal, redaction, and making PDFs text-searchable.

Wednesday, Jan. 8, 2025

How to Fight and Beat Procrastination

This session will dive into the psychological roots of procrastination and provide practical tools to start implementing immediately. You will learn effective strategies and skills for setting and achieving goals, and methods to build an environment conducive to getting things done. Start the new year with new tips and techniques. Learn research-backed strategies and real-world examples, equipping you with the necessary knowledge to overcome procrastination.

Wednesday, March 12, 2025

Top Trends in Ethical Cybersecurity

Practicing anywhere, anytime is no longer just a dream for lawyers; it's a reality. Under Model Rule 1.6, lawyers must take reasonable precautions to protect client info and data in their custody. This seminar will discuss Rules 1.1, 1.6, 5.1, and 5.3 that bind attorneys and the ethical and malpractice pitfalls of mobile, cloud, and everyday computing. Learn how to work anywhere safely and what vulnerabilities to keep in mind.

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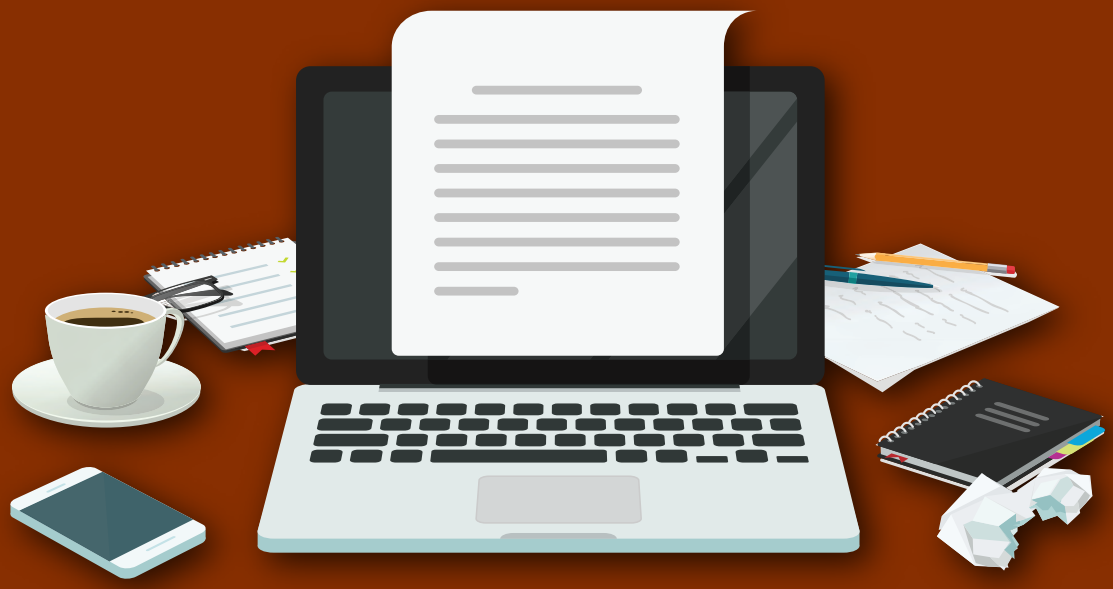

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