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# Environmental Law 2021

USA: Law & Practice

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## Law and Practice

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## 1. REGULATORY FRAMEWORK

### 1.1 Key Environmental Protection Policies, Principles and Laws

New Jersey's core environmental principles and laws have remained largely constant over the past 50 years. Protection of human health and the environment is the driving philosophy behind federal and state environmental regulations. The core principles of New Jersey environmental law broadly fall into the following distinct categories:

- liability for hazardous substances and historical discharges;
- preservation of wetlands and the coastal zone – and now natural resource damages;
- redevelopment/M&A, which arise typically from sale of a facility or change in ownership/control;
- regulatory compliance and permitting;
- global warming and environmental justice, which have recently come to the fore.

In each of these areas, New Jersey's focus is upon protecting human health and the environment. Realistically, human health exposures have always been the primary concern in "the Garden State".

#### Remediation of Hazardous Waste Is a Huge Driver of New Jersey Environmental Law

New Jersey adopted the Spill Compensation and Control Act (Spill Act), NJSA 58 (2011) and the Industrial Site Recovery Act, NJSA 13:1K and NJAC 7:26B – the two primary state laws addressing historical hazardous wastes and site remediation. Although the state's goal is to protect human health and the environment, the state and local governments are typically looking to facilitate the success of corporate operations and will normally work with companies on site remediation so long as the remedial plan is reasonable.

#### New Jersey Is Small, but It Is Preserving what Remains Natural

New Jersey is a major pharmaceutical manufacturer and is densely populated compared to rest of the country. In light of this mixture of manufacturing and dense population, the state acted early on to preserve open space and natural resources such as wetlands. In 1979 New Jersey created the Pinelands Protection Act and, in 2004, the Highlands Protection Act (governing large parts of seven counties in northern New Jersey). The New Jersey State Constitution specifically authorises the legislature to give municipalities zoning power.

#### Green Growth Has Been a New Jersey Goal for 40 Years

Green growth and preserving open land from development has been a significant goal in New Jersey for over 40 years. More recently, New Jersey has extended its focus beyond brownfields and is proactively pursuing financial incentives to reduce greenhouse gas (GHG) emissions and, critically, to make environmental justice an integral part of all environmental permits and transactions. To support more brownfields development, Governor Murphy signed the New Jersey Economic Recovery Act on 7 January 2021. This Act makes awards of up to USD50 million in tax credits for six years for certain redevelopment projects.

#### Natural Resource Damages –Boom and Bust

New Jersey has also pursued natural resource damages (NRDs), but the enforcement in that area, as well as the state's achievements, have been very mixed. Currently, the state is pursuing a few high-profile NRD matters but is not routinely pursuing NRD claims at all remedial sites.

#### New Jersey Has Fully Embraced Environmental Justice with Its First EJ Law

Governor Murphy recently (8 September 2020) signed S-232, which limits new pollution in "over-

burdened communities”. This law is the first in the country to require mandatory permit denials if an environmental justice analysis determines that a new facility disproportionately impacts an overburdened community. In October 2021, the NJDEP announced seven environmental enforcement actions arising from this new law. It is unclear what these lawsuits achieve other than to compel compliance with remedial obligations that are already in place. Nonetheless, environmental justice in yet undefined areas of New Jersey will be subject to detailed environmental justice review.

## 2. ENFORCEMENT

### 2.1 Key Regulatory Authorities

The United States Environmental Protection Agency (USEPA) and the New Jersey Department of Environmental Protection (NJDEP) are the primary authorities. For energy matters, the Board of Public Utilities (BPU) typically works in concert with the NJDEP. New Jersey has a long and somewhat delicate coastline, which is protected under the Coastal Zone Management Act (CZMA), Coastal Area Facility Review Act (CAFRA), Flood Hazard Act (FLHA), Coastal Barrier Resources Act (CBRA) and other statutes. The United States Army Corps of Engineers plays a significant role regarding construction affecting bulkheads and development along the seashore.

#### **Enforcement in Court Is not Typically Undertaken by the NJDEP or USEPA**

Neither the NJDEP nor the BPU typically act to enforce their own rules in court, rather such enforcement is undertaken by the New Jersey Attorney General, or a law firm retained by the state to act on its behalf. Notably, as early as 1974, the state adopted the Environmental Rights Act, NJSA 2A:35A-1 et seq. This law permits a citizen to obtain injunctive relief compel-

ling a defendant to comply with New Jersey’s environmental laws. Nuisance and trespass claims, as well as declaratory actions for environmental insurance coverage, are normally maintained in state court. Some actions, such as CERCLA claims, may be pursued only and solely in federal court.

### **New Jersey Has a Strong and Broad Citizen’s Suit Provision**

Although the NJDEP had been primarily responsible for insuring compliance with environmental laws, on 7 May 2012 New Jersey adopted the Licensed Site Remedial Professional (LSRP) programme. Under this programme, a licensed remedial professional hired by the regulated party (typically, a landowner or operator of a facility) conducts the investigation and remediation of the site. As a result of the LSRP programme, the State of New Jersey infrequently goes to any facilities to investigate, but rather the NJDEP bases much of its decision on the completeness of both the site investigation and remediation upon records provided to the state by the LSRP. Because the state is no longer travelling to the sites and verifying the accuracy of the site investigation (other than by a desktop review), site remediations in New Jersey are conducted much more quickly than prior to 2012.

## 3. ENVIRONMENTAL INCIDENTS AND PERMITS

### 3.1 Investigative and Access Points

Both the USEPA and the NJDEP have broad authority because every manufacturing facility is required to be permitted and the government has the right to enforce permit conditions. The State Attorney General, as well as local police, also have the right to investigate if there is an incident at a regulated facility. The Occupational Safety and Health Administration (OSHA), as well as the New Jersey State Health Department,

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have the right to protect workers from the risk of exposure due to environmental discharges. Both the Constitution of the United States and the New Jersey State Constitution recognise a right to privacy, but the courts have routinely found that the state has a right to investigate while ensuring compliance with environmental permits.

### **3.2 Environmental Permits**

All media (air emissions, water emissions, solid waste disposal, stormwater runoff, chemical handling) are regulated and require permits. This includes permits ranging from emissions from nuclear power plants and sewage treatment facilities and biogas plants, to scrap metal yards; in shore, it includes any activity that may pollute air, water or land. Permits (or the denial of a permit) can be appealed through the Administrative Procedures Act at the state level. Similarly, a petitioner can appeal for a federal permit to the Environmental Appeals Board. Most permits are handled at the state (NJDEP) level.

Some permits, such as construction affecting the coastline or a pier, may require not only state approval but also approval from the Corps of Engineers. Most permits are obtained from the NJDEP, although some facilities, such as biogas plants, require permits not only from the NJDEP but also approval from the BPU. In many circumstances, the state environmental authority has been granted permission to issue permits from the USEPA.

Under the Water Pollution Control Act (WPCA), the most common permit is a New Jersey Pollution Discharge Elimination System (NJPDDES) permit. Related permits typically include stormwater permits. For air emissions, New Jersey follows the federal Clean Air Act paradigm and recognises “minor sources” and “major sources”. New Jersey has specific air emissions regulations regarding sulphur compounds, volatile

organic compounds, toxic substances, oxides of nitrogen and mercury.

## **4. ENVIRONMENTAL LIABILITY**

### **4.1 Key Types of Liability**

Until 2021, the typical environmental liabilities were: historical hazardous waste discharges or releases (addressed under the State Spill Act or under the federal Comprehensive Environmental Response, Compensation, and Liability Act); destruction or impairment of wetlands; injury to the shoreline or dunes (Coastal Zone Management Act); waste water discharge regulations; and, critically, the responsibility for the owner of the property to assure remediation of a manufacturing facility. Civil penalties under the Water Pollution Control Act (WPCA) can be as high as USD50,000. Criminal penalties can include fines up to USD1 million and jail time.

Air emissions are regulated and periodically give rise to liability, but this is far less frequent than claims arising under other media in New Jersey. A potentially responsible party can face risks ranging from a mere compliance order to civil penalties and fines. For those rare cases of intentionally, reckless, or wilful releases causing serious harm or risk, criminal penalties (including jail) have been imposed.

## **5. ENVIRONMENTAL INCIDENTS AND DAMAGE**

### **5.1 Liability for Historical Environmental Incidents or Damage**

Under federal (CERCLA) and state Law (Spill Act), a property owner is by definition a liable party for historical discharges. However, there is a defence for innocent purchasers if they have engaged in “all appropriate inquiry”. This

defence does not relieve the owner if there is a discharge during their tenure on the property in question. A current property owner will have a cause of action against a predecessor owner, but typically must demonstrate that the discharge or release occurred during the prior owner's possession or operation of the facility. Beyond statutory law, New Jersey common law holds a party that engages in abnormally or ultra-hazardous activities strictly liable for injury associated with those actions.

### **Insurance Claims Are Recognised for Historical Risk**

New Jersey has a strong policy of policyholder protection and has recognised the right to recover for historical liabilities against Comprehensive General Liability Insurance Policies. Unlike New York, which has a more insurance company-friendly perspective, New Jersey protects policyholders for historical contamination. In evaluating liability for historical risk, it is important to engage in insurance archaeology and determine whether there is insurance coverage that may respond to such historical risk.

## **5.2 Types of Liability and Key Defences**

Defences and exemptions to Superfund liability are limited to: (i) an act of God, (ii) acts of war, and (iii) an act/omission of a trespasser or other third party with whom the PRP has no contractual relationship, or the acts of a state or local government. Similarly, the New Jersey Spill Compensation and Control Act recognises the defence of act of God, act of war, sabotage (but does not deem state or other governmental action a defence).

Unless protected by an innocent purchaser defence arising from "all appropriate inquiry", there are few true defences for a property owner if the property they own or acquire has been the subject of a hazardous substance discharge. Rather, the focus of such incidents is upon allo-

cation with other potentially responsible parties (PRPs). Both the federal and state law in New Jersey are well developed in allocating questions of relative toxicity, culpability, "time on the risk", volume of material discharged, etc. New Jersey law has squarely adopted the principle stated in *Rylands v Fletcher*, 1 L.R. Exch. 265 (1866) – namely, that one who creates an ultrahazardous condition is strictly liable for the results of their action or inaction.

### **Allocation of Liability –Misery Loves Company**

Although there are few defences to liability for the discharge of hazardous substances, one well-honed aspect of defence is allocating the risk among multiple parties. If there are multiple dischargers facing the same risk (such as the Passaic River Superfund Site, which has a USD1.2 billion remedial estimate), one significant defence is allocating the risk among other dischargers, including the state and the US government. New Jersey's federal and state courts have demonstrated repeatedly that they will hold the US, state, county and municipal governments financially responsible for their contribution to remedial obligations. Where there are multiple potentially responsible parties (PRs), the typical argument is based upon relative volume, toxicity, culpability, and whether one waste stream is driving the remedial action. Ability to pay is a secondary factor, but a significant one.

## **6. CORPORATE LIABILITY**

### **6.1 Liability for Environmental Damage or Breaches of Environmental Law**

Both the USA and the NJDEP have a penalty matrix, which looks at degree of harm, prior environmental non-compliance, good faith efforts to ameliorate risk, as well as other factors. There are different penalty matrices for each media (air, water, soil, as well as human and animal expo-

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sure). One significant factor in applying the penalty matrix is whether the environmental liability was voluntarily disclosed or the result of a routine audit or accident. Typically, the federal and state penalty matrices are far more lenient if the risk is identified voluntarily by the party operating or owning the site.

## **6.2 Shareholder or Parent Company Liability**

Corporate shareholders, directors and officers are normally not at risk of being held responsible for environmental harm. Typically, New Jersey corporate law would protect directors, officers, and shareholders from such risk – unless those individuals were directly involved in or controlled the waste-handling decisions. Holding shareholders liable for breaches of environmental law is extremely rare because New Jersey law recognises the corporate shield. There are a handful of matters where the corporate form was abused and the owner was directly involved in illegal waste-handling decisions.

## **7. PERSONAL LIABILITY**

### **7.1 Directors and Other Officers**

Because New Jersey recognises the corporate shield, it is extremely rare for a director or officer to be held liable for an environmental discharge. In order to pierce the corporate veil and be held liable, the director or officer would have had to be directly involved in the illegal decision and, further, there would likely need to be some strong evidence that the illegal discharge was a wilful or reckless action.

New Jersey law recognises that a person can incorporate, but a small corporation necessarily places the shareholders, directors and officers in the position where they often have direct knowledge of or involvement in waste-handling decisions. If the discharge or release is found to be

merely negligent or unknowing, then the penalty or fine will be commensurate with the risk posed by release. If the discharge or release is found to be reckless or intentional, criminal charges – including jail time – are a real possibility.

### **7.2 Insuring against Liability**

New Jersey has historically been one of the friendliest states to policyholders, and has been a leader in the USA in recognising policyholder rights. New Jersey has recognised coverage for historical discharges, cost cap overrun coverage, and even for punitive damages so long as the claim was not based upon intentional behaviour.

## **8. LENDER LIABILITY**

### **8.1 Financial Institutions/Lender Liability**

New Jersey has recognised a “safe harbour” for lenders that do not participate in the management of a facility. That said, the state will look closely at “indicia of ownership”, such as a security interest, mortgages, deeds of trust, liens, surety bonds, legal or equitable title and pledges. The safe harbour is focused upon historical discharges and is less protective from liability for any discharge or release that occurred during the period in which the owner had a legal interest in the property.

### **8.2 Lender Protection**

Lenders protect themselves by following the requirements under the safe harbour rule – and, in short, avoiding management or control of the operations. Under both federal and state law, controlling operations (especially waste handling and disposal) is the shortest route to being held liable for environmental discharges and releases at a facility. A lender can also protect themselves by having recourse to assets other than real estate assets or the operation being financed

(eg, personal guaranty, stocks, bonds, other property).

## 9. CIVIL LIABILITY

### 9.1 Civil Claims

The NJDEP, USEPA and any private citizen (under the Environmental Rights Act, as well as under common law) has the right to pursue a claim for civil liability in the event of a discharge or release to the environment. Under state law, the state owns all groundwater percolating through the soil. Civil claims can be brought for injunctive relief to compel remedial activity and to compel that such discharges cease. Civil claims for monetary compensation typically include a reimbursement component to satisfy costs incurred by the USEPA or NJDEP.

### 9.2 Exemplary or Punitive Damages

Punitive or exemplary damages are typically brought if there is demonstrated past neglect (failure to report a discharge to the state or USEPA) or if there is a significant breach of an existing Administrative Consent Order. Both the USEPA and the NJDEP have demonstrated that they will use exemplary or punitive damages to fund other goals, such as environmental justice.

### 9.3 Class or Group Actions

Class actions are possible and typically will arise if there is a significant population-affected down-gradient from a discharge or release. Asbestos exposure claims are typically addressed on a class basis as well. The New Jersey federal courts recently recognised a significant class action claim for asbestos exposure due to talc that contained asbestos; *Kimberlee Williams v BASF, Cahill Gordon, 765 F.3d 306 (2014)*.

The federal courts are more restrictive in interpreting the elements of a class action than state courts. Under federal law, a claimant must dem-

onstrate that there is numerosity (ie, that there are more plaintiffs than the court will want to address individually), commonality (that these plaintiffs have claims in common as opposed to individualised claims), and that the named plaintiffs are typical (meaning that the named plaintiffs have a complaint that is representative of other members of the class). These elements are enforced and evaluated strictly in federal court.

In state court, however, the standard is applied much more loosely and, in essence, boils down to whether the plaintiffs' counsel can establish that a class is superior to other available methods for adjudication of the matter. Although commonality and typicality apply to the state court's analysis whether to grant a class, in reality the state courts are much more likely to grant a class action than the federal court.

### 9.4 Landmark Cases

New Jersey's Supreme Court has been a national leader in defining the scope of environmental liability. *NJDEP v Ventron, 94 N.J. 473 (1983)* is a landmark decision ("those who poison the land must pay for its cure" and following *Rylands v Fletcher*).

Among many other ground-breaking decisions, New Jersey has led the USA in environmental insurance claims with cases such as *Morton International v General Accident Insurance, 134 N.J. 1 (1993)* (voiding the pollution exclusion due to regulatory estoppel). For policyholders, *Morton* was a huge victory because the insurers had promised in 1971 that the pollution exclusion was merely a clarification of the existing terms in a CGL Insurance policy. Years later, the carriers – using standard form Insurance Services Offices (ISO) coverage – argued that the pollution exclusion was a significant change in the scope of coverage for historical environmental risk. The New Jersey Supreme Court in *Morton* ruled that the insurers, having previously said that the

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pollution exclusion was merely a clarification, were held estopped from now arguing that the pollution exclusion was a significant change in coverage – and so the pollution exclusion was eliminated in New Jersey. (After several years, the insurers then adopted the Absolute Pollution Exclusion, which Morton did not address.)

## 10. CONTRACTUAL AGREEMENTS

### 10.1 Transferring or Apportioning Liability

New Jersey will recognise both the duty to indemnify for environmental liability and for contractual assumption of such liability. That said, the party that owned the property at the time of a discharge or release remains ultimately liable if such indemnity or guaranty is not honoured.

### 10.2 Environmental Insurance

New Jersey corporations have access to the full array of environmental risk insurance products covering risks such as new pollution coverage, cost cap coverage, environmental investigation coverage among others. Under New Jersey law, occurrence-based policies, such as a CGL policy, will typically be found to cover any discharge or release going back to 1941 (when the first “all risks” policies were issued).

## 11. CONTAMINATED LAND

### 11.1 Key Laws Governing Contaminated Land

The most critical state law is the Industrial Site Recovery Act (NJSA 13:1K and NJAC 7:26B), which requires the remediation of certain business operations as a critical component of a sale or transfer. For historical discharges and releases, the key statute is the New Jersey Spill Compensation and Control Act, NJSA 58:10-23.11.

The federal CERCLA statute is premised upon New Jersey’s Spill Act. Currently, environmental justice is a heavy area of focus for the State of New Jersey.

## 12. CLIMATE CHANGE AND EMISSIONS TRADING

### 12.1 Key Policies, Principles and Laws

New Jersey adopted the Global Warming Response Act (GWRA) in 2007 and updated the law in 2019. The NJDEP is responsible for assessing the state’s greenhouse gas emissions and, in collaboration with other state agencies, presenting recommendations for reducing emissions by 20% below 2006 levels by 2020 and 80% by 2050. Governor Murphy’s goal is for the state to use 100% clean energy by that date as well.

### 12.2 Targets to Reduce Greenhouse Gas Emissions

The state’s goal is to have an 80% reduction in greenhouse emissions by 2050. This is a daunting goal for New Jersey, which is the most densely populated state in the nation.

## 13. ASBESTOS

### 13.1 Key Policies, Principles and Laws Relating to Asbestos

Asbestos risk arises primarily in two areas: (i) inside buildings, where the risk requires encapsulation to avoid exposure or removal before demolition; and (ii) exposure to workers or consumers from products that contain friable asbestos. The federal Occupational Safety and Health Administration (OSHA) governs most works’ employees. New Jersey has detailed laws, NJSA 34:5A-32 et seq and NJAC 12:120 et seq, which govern training and safety requirements for asbestos-removal professionals.

## 14. WASTE

### 14.1 Key Laws and Regulatory Controls

The Solid Waste Management Act at N.J.S.A. 13:1E-99.16(b) mandates that each municipality adopts an ordinance that requires generators of municipal solid waste to source-separate. All waste must be source-separated at the point of generation, unless specifically exempted by the local recycling co-ordinator.

### 14.2 Retention of Environmental Liability

Under federal and state law, a generator of hazardous waste is strictly liable for environmental injury caused by that waste. For solid waste that does not contain any component hazardous waste, New Jersey law will recognise a licensed solid waste hauler as responsible for handling waste, pursuant to its contractual and legal requirements.

### 14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

The issue of a manufacturer's duty to reclaim, recover or recycle goods typically arises under products liability law in New Jersey. If the product is abnormally dangerous (even if it was not considered so at the time of disposal) then either the NJDEP or a successor owner or a private citizen can later compel remedial action. We are unable to find any case law supporting that the manufacturer is required under environmental laws (as opposed to products recall) to recover, recycle or redesign its goods.

## 15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

### 15.1 Self-Reporting Requirements

New Jersey's Spill Act, NJSA 58:10-23 requires disclosure of discharge or release of a hazardous substance. The Clean Water Act and the Clean Air Act both require that emissions and discharges be self-monitored pursuant to the permit granted to the facility. For all media, self-reporting – as opposed to having a discharge discovered during a routine NJDEP/USEPA audit – is a significant factor in determining any penalties or fines. Self-reporting will be considered at the penalty-reduction phase.

### 15.2 Public Environmental Information

In brief, all environmental information is available to the public through the federal Freedom of Information Act (FOIA) or the under New Jersey's Right to Know Act. There are limited exceptions for national security and proprietary materials. "Public authorities" is defined broadly to include any municipal, county or state entity.

### 15.3 Corporate Disclosure Requirement

The BPU requires that electricity suppliers/providers disclose the environmental characteristics of the electricity purchased by customers (NJAC 14:8-3.1). Federal law (the Securities and Exchange Commission) requires disclosure for any publicly traded company of a penalty of USD100,000 or more (17 CFR 229.103). New Jersey has no specific requirement for environmental disclosure in annual reports.

## 16. TRANSACTIONS

### 16.1 Environmental Due Diligence

Environmental due diligence is typical in M&A, property transfers and any significant refinancing. In May 1993, the American Society for Test-

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ing and Materials (ASTM) issued its Environmental Site Assessment standard. New Jersey promptly adopted the ASTM standard.

However, in New Jersey, performance of an environmental site assessment in accordance with the ASTM standard will not be sufficient to satisfy the requirements of the Spill Acts innocent landowner defence. Rather, both the Spill Act and the Industrial Site Recovery Act require the more stringent “all appropriate inquiry” standard. This typically commences with a Phase I, which is a desktop exercise based upon written records. Parties can also engage in a transaction screen assessment (TSA), which is a watered-down Phase I, but it is also not as protective of the seller. If any environmental conditions of concern are found, a Phase II (sampling) will typically be required.

Triggers for environmental due diligence are normally:

- the sale of the property in question;
- change in ownership/control; or
- significant refinancing of the enterprise.

In short, the NJDEP wants to know who is in control of the operation in question. If the contemplated transaction affects control or operational responsibility, it is a fair assumption that environmental due diligence will be required.

## **16.2 Disclosure of Environmental Information**

New Jersey has a strong policy requiring a property owner to disclose all known and suspected environmental risk; *Strawn v Canuso*, 140 N.J. 43 (1995). Failure to disclose even an environmental condition (if the seller knows of that condition) on a nearby property may be considered a material omission.

## **17. TAXES**

### **17.1 Green Taxes**

Since 1974, with the Green Acres Tax Exemption Program – which provides property owners with tax incentives if they open private land for public use and conservation purposes – New Jersey has led the country in this area. New Jersey has long had sales tax exemption for zero-emissions vehicles (NJSA 54:32B-8.55). Similarly, New Jersey has tax exemptions for environmental opportunity zones: NJSA 54:4-3.150; Offshore Wind Economic Development, NJSA 34: B-209.4; Recycling Equipment, NJSA 54:10-5.3; Remediation, 54:10A-5.33; Brown-field Sites, NJSA 58:10B-1.1

On 7 January 2021, Governor Murphy signed into law the New Jersey Economic Recovery Act of 2020, which enables the New Jersey Economic Development Authority to grant awards of up to USD50 million in tax credits annually for six years for redevelopment projects in order to address environmental contamination and asbestos, among other contaminants.

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**Fox Rothschild LLP** has nearly 1,000 lawyers in 27 locations spanning the USA. Its footprint extends from Seattle, Washington, to Miami, Florida, and from Los Angeles, California, to New York City. It is a true nationwide environmental practice. The firm's environmental practice works as one team, with environmental lawyers experienced in environmental real estate

transactions, hazardous waste litigation, permitting, green growth development, site remediation, toxic torts, biogas facilities, brownfields and, in short, the full array of environmental law. Environmental justice is now a required consideration in many environmental matters and the firm's team has broad experience helping its clients navigate this evolving area.

## AUTHORS



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