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CHAMBERS GLOBAL PRACTICE GUIDES

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# Environmental Law 2022

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## **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, with the protection of human health and the environment being 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 the sale of a facility or a change in ownership/control;
- regulatory compliance and permitting; and
- 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. Human health exposures have always been the primary concern in "the Garden State".

2022 has been an extremely active year for the New Jersey Department of Environmental Protection (NJDEP), which has embarked on an aggressive agenda. New Jersey has now banned single-use plastic bags for shopping (effective 1 September 2022). New Jersey has been especially focused on environmental justice and global warming.

Pursuant to legislation signed by Governor Murphy in September 2020, important areas of environmental law are now subject to environmental justice review. New Jersey's Environmental Jus-

tice Law (NJSA 13:1D-157 to 161) requires the NJDEP to evaluate the environmental and public health impacts of facilities in overburdened communities when making certain permit decisions (NJSA 13:1D-161(a)). The NJDEP proposed broad rules to implement the Environmental Justice Law in June 2022.

In addition to environmental justice, the State of New Jersey is also embracing head-on the battle with global warming. Consistent with this emphasis, the NJDEP has now launched a website for Healthy Community Planning New Jersey ([www.nj.gov/health/hcpnj](http://www.nj.gov/health/hcpnj)), which provides municipal and local governmental authorities with "critical municipal health and environmental data to help them plan and promote a safe and healthy environment".

Beyond environmental justice and global warming, the NJDEP is acting aggressively to regulate per and polyfluoroalkyl substances (PFAS), as follows.

- Hazardous substance designations:
  - (a) the NJDEP has listed perfluorooctanoic acid (PFOA), perfluorononanoic acid (PFNA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under the Spill Compensation and Control Act (Spill Act) and related statutes and regulations.
- Remediation standards:
  - (a) the NJDEP has issued final groundwater remediation (in New Jersey, remediation refers to both investigation and clean-up) standards (Specific Ground Water Quality Criteria) for PFOA and PFNA;
  - (b) the NJDEP has issued interim groundwater remediation standards for a class of PFAS it refers to as chloroperfluoropolyether carboxylates (CIPFPECAs); and

- (c) the NJDEP has issued direct contact soils standards for PFOA, PFOA and PFOS, and determined that specific site and area of concern standards will need to be developed for each of these substances for the soil to groundwater pathway.
- Drinking water standards:
  - (a) the NJDEP has issued drinking water maximum contaminant levels for PFOA, PFOS and PFNA.

In August 2022, the United States Environmental Protection Agency (USEPA) proposed listing PFOA and PFOS as hazardous substances under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and will be accepting comment on whether other PFAS substances should also be so designated. The inclusion of PFOA, PFOS and PFNA on federal and New Jersey hazardous substance lists may require the reopening of hazardous waste sites in New Jersey that were otherwise deemed closed.

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

New Jersey's Spill Act (NJSA 58:10-23.11 et seq (2011)), Industrial Site Recovery Act (NJSA 13:1K), Brownfield and Contaminated Site Remediation Act and Site Remediation and Reform Act, and the Administrative Requirements for Site Remediation and Technical Requirements for Site Remediation are the primary laws and regulations addressing historical hazardous waste sites and site remediation.

New Jersey is a major manufacturer of pharmaceutical and other products, and is densely populated compared to the 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 wet-

lands. In 1979, New Jersey created the Pine-lands Protection Act and, in 2004, the Highlands Protection Act (governing large parts of seven counties in northern New Jersey).

### **Green Growth has been a New Jersey Goal for 40 Years**

Green growth and preserving open land from development have been significant goals 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 emissions and, critically, to make environmental justice an integral part of 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.

The NJDEP was among the first state agencies in the country to produce a comprehensive report on the impacts climate change is having on human health and the environment ([www.nj.gov/dep/climatechange/data.html](http://www.nj.gov/dep/climatechange/data.html)). NJDEP Commissioner Shawn M LaTourette has stated that "climbing temperatures, more frequent intense rainfall, and rising sea levels are well-known consequences of climate change that are impacting New Jersey and will worsen in the years ahead". The NJDEP is concerned not only with global warming but also with secondary impacts such as increased mould, insects (ticks and mosquitoes in particular), asthma-exacerbating weather and the increased risk of infectious disease. In addition to studies, New Jersey has awarded more than USD10 million in grants to reduce the impact of climate change.

## 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. In 2022, New Jersey filed several minor new NRD claims but the largest effort has been in resolving the approximately USD1.2 billion claim for remediation of the Passaic River. The state and federal governments have been negotiating with a large group of potentially responsible parties (PRPs) and it appears that this site will be active for a while, but that many PRPs will have resolved their individual corporate liability.

## New Jersey has Fully Embraced Environmental Justice with its First Environmental Justice Law

On 8 September 2020, Governor Murphy signed S-232, which limits new pollution in “overburdened 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 addition, since 2021, the New Jersey Attorney General and the NJDEP have collaborated to initiate multiple rounds of enforcement actions related to contaminated sites in communities that are defined as overburdened communities under the Environmental Justice Law. These lawsuits seek to compel compliance with remedial obligations that are already in place in these communities.

New Jersey now requires an environmental justice review for certain activities that require new or renewed permits in specified communities (mostly low-income and minority areas). This review process is rigorous and obligates the company proposing to construct or modify cer-

tain types of facilities to first identify the impacted community. The party proposing modification of such a facility must then inform the community in detail about the plant's operations and any proposed changes. Beyond written information, the proponent of any project is required to actively engage in public meetings, to have a stenographer record those meetings, and to transmit that record to the NJDEP for review and comment.

The environmental justice law defines an overburdened community as any census block group 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 recognised tribal community; or (3) at least 40 percent of the households have limited English proficiency” (NJSA 13:1D-158). The law then defines eight types of facilities that are subject to environmental justice review. The regulations proposed in 2022 spell out the multiple steps that must be taken to satisfy New Jersey's environmental justice law (Proposed Rules NJAC 7:1C-2.2).

## 2. Enforcement

### 2.1 Key Regulatory Authorities

The USEPA and the NJDEP are the primary, but not only, agencies with authority to enforce environmental requirements in New Jersey. 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, the Coastal Area Facility Review Act, the Flood Hazard Act, the Coastal Barrier Resources Act 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 by a law firm retained by the state to act on its behalf. Notably, the state adopted the Environmental Rights Act (ERA) as early as 1974 (NJSA 2A:35A-1 et seq), which permits a citizen to obtain injunctive relief compelling 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 Citizens' Suit Provision**

Although the NJDEP had been primarily responsible for ensuring compliance with its environmental laws in site remediation, on 7 May 2012 New Jersey adopted the Licensed Site Remedial Professional (LSRP) programme under the Site Remediation Reform Act. 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 NJDEP bases much of its decisions on the completeness of both the site investigation and remediation upon records provided to the state by the LSRP. As a result of this programme, 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 regulations and permit conditions. The State Attorney General and local police also have the right to investigate if there is an incident at a regulated facility. The Occupational Safety and Health Administration (OSHA) and the New Jersey State Health Department have the right to protect workers from the risk of exposure due to environmental discharges. Courts have routinely found that the state has a right to investigate while ensuring compliance with environmental permits.

### **3.2 Environmental Permits**

Discharges to all media (air emissions, water emissions, solid waste disposal, stormwater runoff) 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 short, it includes any activity that may pollute air, water or land. Permits (or the denial of a permit) can be appealed through the Administrative Procedure Act at the state level. Similarly, a petitioner can appeal a federal permit to the Environmental Appeals Board. Most permits are handled at the state level (by the NJDEP).

Some permits, such as for 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 approval from the BPU as well as permits from the NJDEP. In many circumstances, the state environmental authority has been

granted authority to issue permits in lieu of the USEPA.

Under the Water Pollution Control Act (WPCA), the most common permit is a New Jersey Pollutant Discharge Elimination System permit. Related permits 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.

On 30 June 2022, the United States Supreme Court issues a 6-3 decision in the matter of *West Virginia v United States Environmental Protection Agency (USEPA)* (Docket No 20-1530). This opinion significantly curtailed the jurisdiction of the USEPA to address greenhouse gases. Notably, the Court interjected a seldom-used concept by invoking the “Major Questions Doctrine”, which is not clearly defined but has been used to limit an agency’s authority to act to address a question of major national significance. In light of the Court’s ruling limiting the USEPA’s ability to address global warming, it is widely predicted that the Supreme Court of the United States will limit the USEPA’s jurisdiction in other areas, including potentially under the Clean Water Act.

Fuelling this speculation, the Court granted certiorari on 24 January 2022 in the matter of *Sackett v USEPA* (142 S.Ct. 896 (2022)), a case that has been to the Supreme Court previously and concerns private landowners’ use of property deemed to contain wetlands. Both the *West Virginia Clean Air Act* case and the *Sackett* case are important to New Jersey because, as the power of the USEPA is curtailed, the power of the NJDEP (state) to fill the void may become increasingly significant.

## 4. Environmental Liability

### 4.1 Key Types of Liability

The typical environmental liabilities are:

- historical hazardous waste discharges or releases (addressed under the state Spill Act or CERCLA);
- 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 WPCA can be as high as USD50,000. Criminal penalties can include fines of 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 intentional, 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

New Jersey holds those who discharge hazardous substances and the owners of properties where those discharges have occurred strictly liable for discharges during their ownership or operation. New Jersey supports this position through common law as well as federal and state

statutes. New Jersey's Supreme Court held that the owner at a time of discharge is jointly and strictly liable for such discharge (NJDEP v Ventron, 94 N.J. 473 (1983)).

New Jersey's Spill Act (NJSA 58:10-23.11s et seq) is a state statute holding persons who discharge or are "in any way responsible" for the discharge or release of hazardous substances strictly liable for such discharge on joint and several bases. New Jersey's Spill Act was then used as the template for the federal CERCLA law, which, like the Spill Act, holds dischargers and owners of property at the time of discharge strictly liable for the remediation of such discharges.

Under federal (CERCLA) and state law (Spill Act), a property owner is by definition a liable party for historical discharges. However, there is liability protection for purchasers if they have engaged in "all appropriate inquiry" and otherwise satisfy certain requirements in the acquisition and ownership of the property. 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. New Jersey has several active litigation cases arising from the New Pollution Conditions Coverage policies.

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

The New Jersey Spill Compensation and Control Act recognises the defences of act of God, act of war and sabotage (but does not deem state or other governmental action a defence).

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, but there are some strategies to lessen or mitigate potential liability. Rather, the focus is often on allocation with other 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, "contribution" and allocating the risk among other dischargers helps to mitigate the burden. Other responsible

parties can include 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 PRPs, 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. New Jersey courts permit the allocation of liability between alleged dischargers pursuant to both federal and state law.

## 6. Corporate Liability

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

Both the USA and the NJDEP have penalty matrices, which look at degree of harm, prior environmental non-compliance and good faith efforts to ameliorate risk, as well as other factors. There are different penalty matrices for each media (air, water and soil, as well as human and animal exposure), although some regulations have replaced matrices with recommended penalty amounts for specific violations or types of violations. One significant factor in applying the penalty matrix is whether the environmental violation was voluntarily disclosed under and consistent with applicable disclosure policies, and, for example, was the result of a routine audit or accident. Typically, the federal and state penalty matrices are far more lenient if the disclosure policies are satisfied and the violation has been 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, or unless other circumstances apply. Holding shareholders liable for breaches of environmental law is rare because New Jersey law recognises the corporate shield. There have been a handful of exceptions 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 normally recognises the corporate shield, it is rare for a director or officer to be held liable for an environmental discharge. In order for the individual to be held liable, the director or officer would have had to be directly involved in the illegal decision or the corporate veil pierced, 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. New Jersey is the most densely populated state in the country, and one insurance product that is of particular interest here is New Pollution Conditions Coverage, which insures against additional pollution beyond a known benchmark. These policies have proven difficult to apply in reality and there are several active cases and appeals that will interpret them under New Jersey law.

## 8. Lender Liability

### 8.1 Financial Institutions/Lender Liability

New Jersey has recognised in general 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 on 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 or other property).

## 9. Civil Liability

### 9.1 Civil Claims

The NJDEP, USEPA and any private citizen (under the ERA, as well as under common law) have 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. 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.

In 1974, New Jersey adopted the ERA, which empowers citizens of New Jersey to file suit to compel compliance with New Jersey’s environmental laws (both state and federal). The ERA is a powerful tool because it permits private citizens (in instances where the state has failed to act) to demand injunctive relief (either to compel a party to comply with the law or to cease violating the law).

### 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 will typically arise if there is a significant population-affected down-gradient from a discharge or release. The New Jersey federal courts have 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 demonstrate that there is numerosity (ie, that there are more plaintiffs than the court will want to address individually) and 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 of whether to grant a class, 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 comprehensive general liability (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 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 the duty to indemnify both 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. The Industrial Site Recovery Act (NJSA 13:1K and NJAC 7:26B) permits one property owner to transfer contaminated land to another. The state must be notified of the proposed transfer, and the current owner must address by agreement that the successor owner is responsible

for site remediation. If the successor owner that promised to remediate fails to act, the state may bypass the contractual agreement and proceed to file an action against the original owner at the time of the discharge or release.

## 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 and 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). New Jersey has historically been very policyholder-friendly and has an extremely well-developed body of case law regarding coverage under CGL policies, the pollution exclusion, allocation of risk over the time of plant operation, and more recently regarding New Pollution Condition Coverage policies.

Owens-Illinois v United Ins. Co. (138 N.J. 437 (1994)), Carter-Wallace, Inc. v Admiral Ins. Co. (154 N.J. 312 (1998)) and Spaulding Composites Company v Caldwell Trucking PRP Group (176 N.J. 25 (2003)) are the leading allocation cases in New Jersey and have been adopted by many other states within the United States. As part of allocation, New Jersey law has also addressed the time period of allocation, in Quincy Mutual Fire Insurance Company v Bellmawr (172 N.J. 409 (2002)). New Jersey does not recognise the pollution exclusion because the Supreme Court of New Jersey has estopped insurance carriers from invoking that provision, in Morton International v General Accident Insurance Company of America (134 N.J. 1 (1993)).

## 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, for 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. New Jersey has shown that it is committed to fighting climate change. Not only is New Jersey allocating millions of dollars to the study of the impact of climate change, but Governor Murphy has signed Executive Order No 307, which commits the state to increasing offshore wind power by 50% to 11,000 MW by 2040.

By a separate Executive Order, No 221, Governor Murphy has established an Office of Climate Action and Green Economy (issued 16 February

2021). Pursuant to this Executive Order, the governor is required to appoint a council including the Executive Director of the Climate Office, the Chief Policy Adviser and Deputy Chief of Staff for Economic Growth, and others. Objectives of this Office will be to develop a more expansive definition of “green job” and to conduct analyses of green job opportunities. Other duties of this office are to co-ordinate efforts across relevant governmental programmes and private industry, focused on incorporating equitable workforce development into all environmental infrastructure projects.

## 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:

- inside buildings, where the risk requires encapsulation to avoid exposure or removal before demolition; and
- exposure to workers or consumers from products that contain friable asbestos.

The federal Clean Air Act and Occupational Safety and Health Administration (OSHA) govern the management of asbestos-containing materials and most employee exposures. New Jersey has detailed laws (NJSA 34:5A-32 et seq and NJAC 12:120 et seq) that govern training and safety requirements for asbestos-removal professionals.

## 14. Waste

### 14.1 Key Laws and Regulatory Controls

The Solid Waste Management Act (NJSA 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 being 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. As far as is known, there is no case law supporting that the manufacturer is required to recover, recycle or redesign its goods under environmental laws (as opposed to products recall).

## 15. Environmental Disclosure and Information

### 15.1 Self-Reporting Requirements

New Jersey's Spill Act requires the 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. New Jersey has a spill hotline: (877) 927-6337.

### 15.2 Public Environmental Information

In brief, all environmental information is available to the public through the federal Freedom of Information Act (FOIA) or under New Jersey's Right to Know Act as amended by New Jersey's Open Public Records 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 electricity suppliers/providers to disclose the environmental characteristics of the electricity purchased by customers (NJAC 14:8-3.1).

## 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 Testing and Materials (ASTM) issued its Environmental Site Assessment standard practice.

New Jersey promptly adopted the ASTM standard practice, and subsequent versions of the standard practices have been issued every five years or so by ASTM.

However, in New Jersey, performance of an environmental site assessment in accordance with the ASTM standard alone will not be sufficient to satisfy the requirements of the Spill Act's innocent landowner defence: both the Spill Act and the Industrial Site Recovery Act require the more stringent "all appropriate inquiry" standard (*Marsh v New Jersey Department of Environmental Protection*, 152 N.J. 137, 141 (1997)). 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, 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;
- a change in ownership/control; or
- a 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 an environmental condition (if the seller knows of that condition)

on a nearby property may even be considered a material omission.

## 17. Taxes

### 17.1 Green Taxes

Since the 1974 enactment of 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); and Brownfield 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.

**Fox Rothschild LLP** has nearly 1,000 lawyers in 29 locations spanning the USA. The footprint of the nationwide environmental practice extends from Seattle, Washington, to Miami, Florida, and from Los Angeles, California, to New York City. The firm's environmental lawyers are experienced in environmental real estate transactions, hazardous waste litigation, per-

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

## Authors



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