

The Complexity of Environmental Litigation in New Jersey Requires Both Mind and Muscle

Given New Jersey's heavy-handed environmental rules, regulations and laws, NJDEP enforcement through costly delays and litigation requires having a hired gun. If you're smart, an attorney specializing in environmental law will be on your speed dial.

COMPILED BY MILES Z. EPSTEIN
EDITOR, COMMERCE

IN THE GARDEN STATE, ENVIRONMENTAL LITIGATION is a pre-existing condition. The patchwork of small, local governments throughout New Jersey combined with the heavy hand of the New Jersey Department of Environmental Protection makes the state a minefield of codes, ordinances, rules, regulations and laws. If you don't have an attorney with experience managing these liabilities for your firm, you will live to regret it. Here are some examples of how law firms acted to help business clients in this complicated and highly regulated environment. In New Jersey, a green thumb is often replaced by a middle finger if you are counting on common sense versus good legal counsel.

Anderson Kill & Olick, P.C.

By Steven J. Pudell, Esq., Managing Shareholder, Newark Office

Anderson Kill & Olick locates insurance coverage for commercial property owners sued over pollution that occurred decades earlier. Insurance coverage is often like child support: you only collect if you're very persistent. Years after selling a commercial property, two brothers were sued by the buyer for environmental cleanup of pollution allegedly caused decades earlier by a dry cleaner. The brothers retained Anderson Kill in 2006 to find insurance coverage for



Steven J. Pudell, Esq.

the claim. Recovery hinged on finding evidence of coverage dating from the 1970s. The attorneys started work with scraps of evidence. A performance bond from 1974 and policies from the late 1980s pointed toward insurers likely to have sold coverage during the occurrence period. Anderson Kill wrote repeatedly to these insurers asking them to find evidence of coverage; the insurers kept denying that such evidence existed. Finally, an attorney for one insurer announced that two boxes "that might interest you" had been found in a warehouse. Therein was a document that alluded to two policy renewals—and also to another insurer's request for their "loss runs." At the bottom was scribbled what proved to be a second insurer's policy number. Both insurers ultimately admitted coverage for the cleanup and court costs; a third insurer followed suit. The brothers recovered the entirety of their cleanup and legal costs.

Cole, Schotz, Meisel, Forman & Leonard, P.A.

By David Steinberger, Esq., Member

Cole Schotz has represented a religious institution in its plans to redevelop its property, a former industrial facility, into a large religious sanctuary with ancillary facilities. In pursuing this project, Cole Schotz has been instrumental in helping the client obtain critical land use approvals from the New Jersey Department of Environmental Protection, including wetlands and flood hazard area control act permits and a Highlands Act exemption. These permits were obtained notwithstand-

continued on page 30



David Steinberger, Esq.

continued from page 28

ing critical environmental constraints on the property and significant community resistance. Cole Schotz was also able to successfully obtain the necessary approvals for the client to construct and operate a temporary sanctuary on its property, pending construction of the larger sanctuary in the future. Finally, Cole Schotz also successfully intervened in a lawsuit wherein another developer in the municipality attempted to obtain all potable water

allocated to our client and other developers within the municipality. In successfully intervening in that action, Cole Schotz was able to protect our client's access to a limited resource within the municipality.

Goldstein, Vespi & Vasquez, L.L.C.

By Jerry D. Goldstein, Esq., Managing Partner

A Chapter 11 bankruptcy client owned a valuable but contaminated commercial property in Newark. As part of the plan of reorganization, the property had to be sold. Unfortunately, the debtor in possession was a family-owned business and the property was owned by



Jerry D. Goldstein, Esq.

the individual family members who, as usually is the case, did not see eye to eye on any issues. Through extensive mediation and targeted negotiations, we were able to come to an agreement with government officials, owners, creditors, the trustee, community groups, and lenders. Since I concentrate my practice in the area of alternative dispute resolution, I was able to calmly

lead the parties through a maze of issues and road blocks so that a quick and efficient resolution was achieved without the need for lengthy and exhaustive litigation. The end result was the debtor's withdrawal from bankruptcy with each creditor receiving some percentage of their debt and no discharge of the balance. The company, an oil distributor and environmental remediation group, received financing to clean up its site so title could be transferred, purchased a new venue as its operational site, and successfully completed its reorganization outside of bankruptcy.

Understanding the nuances of using alternative dispute reso-



Steve Barnett, Esq.

Connell Foley LLP

By Steve Barnett, Esq., Counsel

A garbage truck fire caused a client to receive an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) from DEP for violations of hazardous waste rules. The client shared a dumpster with a co-tenant and the dumpster was only one of the pickups made by the garbage truck that day. Inspection of the fire debris revealed empty chemical containers but no hazardous wastes and no identification of the client's products. DEP inspection of the client and co-tenant's business location revealed a small shared laboratory with product samples and laboratory chemicals. The co-tenant had recently taken steps to move out, in the course of which the co-tenant had arranged for disposal of certain materials from the shared laboratory and associated storage shelves as non-hazardous waste. We interviewed emergency response personnel, reviewed the client's material handling, storage and disposal practices, inventory records and Material Safety Data Sheets for compliance with RCRA and DEP hazardous waste rules, and we interviewed and obtained the certified statement of a former employee of the co-tenant. Based on the results of our investigation, DEP agreed to significantly reduce the penalty amount, and our client and co-tenant reached a settlement agreeable to both parties.

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On America's first official Earth Day, April 22, 1970, the New Jersey Department of Environmental Protection was born. New Jersey became the third state in the country to consolidate its past programs into a unified major agency to administer aggressive environmental protection and conservation efforts. Former Governor William T. Cahill appointed Richard J. Sullivan as the first commissioner.

continued on page 32

continued from page 30

lution in both bankruptcy and environmental matters was a key to successfully saving all of the parties to this action hundreds of thousands of dollars.

Lindabury, McCormick, Estabrook & Cooper

By David R. Pierce, Esq., Senior Partner, Environmental Group

Lindabury recently assisted a client in resolving a contentious dispute with the Department of Environmental Protection. The client, a brownfields developer, had



David R. Pierce, Esq.

acquired, developed and resold a contaminated property in Northern New Jersey. The client acquired the property from the original owner and assumed responsibility for the remediation which had been ongoing since approximately 1988. Despite the fact that an extensive soil investigation had been conducted and extensive remediation had been completed at the site, the contaminated groundwater had not lessened as expected due to unique geologic features of the site. In the last few years,

the NJDEP, through its geologist, sought to reopen the soil remediation project with the expectation of finding a previously undetected source of groundwater contamination. An experienced environmental lawyer and advocate with a degree in environmental engineering, I was brought in to work closely with the client's environmental consultant to represent the client. After gaining an understanding of the nuances of the site and reviewing the activities conducted there, I made several unsuccessful attempts to dissuade the NJDEP's technical team from reopening the matter. He then requested that a technical review panel be convened. As a result of the presentation and advocacy at the technical review panel, the NJDEP overruled its technical team and declared the soil issues closed.

McCarter & English LLP

By Lanny S. Kurzweil, Esq., Partner

Don't be afraid to be creative and think outside the box. Most parties in a private dispute, or agencies in a public matter, are looking for a resolution, not a morass. Once we are able to identify the issues and understand everyone's goals and objectives, we look for a solution that fits, even if unconventional. For example, responsible parties often find themselves conducting a remediation at a site that they no longer own. The current owner's interests in developing or using a site that is undergoing remediation may be substantially different than the responsible party who is performing the remedy. Consider bifurcating responsibilities for the environmental media that each party is willing to remediate to meet their respective objectives and you might find a res-



A good attorney can be the key to successfully resolving environmental run-ins with the New Jersey Department of Environmental Protection.



Lanny S. Kurzweil, Esq.

olution. In the area of natural resource damages—still a hotly disputed subject—remember that damages are typically measured from the perspective of the allegedly injured party. Responsible parties may hold title to idle,

unused property. However, that property, based upon its location and its resources, may possess an inherent high public value—such as areas that provide access to the waterfront or scenic relief—and may be used to offset potential NRD liabilities.

Nachman & Associates, P.C.

By David H. Nachman, Esq., Principal

The environmental arena is complex and sophisticated. Our law practice continues to serve this important industry sector. We provide numerous services to environmental consulting and engineering firms including immigration, benefit and compliance services. We continue to prepare H-1B nonimmigrant professional visas for environmental and engineering companies throughout New Jersey and across the country. One of the distinct challenges of providing visa "benefits" (and transfer services) to highly-skilled engineering and technology workers continues to be meeting the client's immediate

continued on page 34



David H. Nachman, Esq.

continued from page 32

workflow needs. Recently, one of our environmental engineering clients partnered with a South American petroleum reseller. The project required the transfer of a dozen U.S., Canadian and other workers to Mexico for a project. Our law firm's Canadian Division (NAFTA Specialists) helped us to secure permission from Mexican authorities to transfer the workers with celerity. On the "compliance-side," our attorneys work closely with HR Managers to assist with employment verification

(Form I-9) rules under the Immigration Reform and Control Act of 1986 (as amended). Lately, compliance services focus on the new Federal Contractor E-Verify rules that became effective on Sept. 8, 2009. These new rules concern our clients since many environmental and engineering firms are the beneficiaries of important state, local and federal government contracts.

Patton Boggs LLP

By John McGabren, Managing Partner, New Jersey Office

Patton Boggs' experience in negotiating complex environmental and transportation agreements with state and local authorities helped U.S. Ecology, a major national hazardous waste transportation and disposal firm, to obtain New Jersey Department of Environmental Protection approval to site a new rail transfer facility in



John McGabren, Esq.

Northern New Jersey in the midst of a highly charged and uncertain regulatory climate surrounding rail transport of hazardous wastes. U.S. Ecology sought approval for the new facility to transfer chromium wastes from a major North Jersey remediation project to rail for shipment to its disposal sites in the Western United States. Gaining state and local approval for such a facility

was particularly challenging at the time due to the ongoing controversy between the state and rail transload operators, focused on the issue of whether federal law exempted such facilities from state regulation of their construction and operation. In the midst of this ongoing rail-transload controversy, Patton Boggs and U.S. Ecology successfully negotiated with state authorities to obtain approval for the facility, embodied in an administrative consent order defining the regulatory structure under which the facility would be built and operated, and concurrently settled the company's outstanding issues regarding state waste transportation licenses.

Riker Danzig Scherer Hyland & Perretti LLP

By Steven T. Senior, Counsel, Environmental Law Group

Thirty environmental engineering and consulting firms (the LSP Consultant Coalition) turned to Riker Danzig for advice and advocacy on the legislative proposal to create a Licensed Site Remediation Professional (LSRP) program. The initial proposal had been publicly called an "abomination," threatening the livelihoods of all site remediation professionals. It would have subjected LSRPs to licensing by the NJDEP as "judge, jury and executioner" and penalties of up to \$50,000 per day against individuals for regulatory infractions. It also omitted fundamental changes needed to site remediation rules and practice. Riker Danzig effectively advocated to protect the interests of the Coalition members and improve the LSRP program, in the most significant legislative proceed-

2009 CALENDAR
OF COMING EVENTS

Please reserve these dates on your 2009 business calendar:

<p>November 4 Human Resource Roundtable Meeting 8:00 a.m. - 10:30 a.m. CIANJ Conference Room, Paramus</p> <p>November 17 Women of Influence Series 4:30 p.m. - 6:00 p.m. Bergen Community College, Paramus</p> <p>November 24 Environmental Business Council Roundtable 8:00 a.m. - 9:30 a.m. PSE&G Training Center, Edison</p> <p>December 1 Real Property Roundtable 8:00 a.m. - 9:30 a.m. Hilton Hasbrouck Heights</p>	<p>December 8 Financial Decision Makers Roundtable 8:00 a.m. - 10:00 a.m. Hilton Hasbrouck Heights</p> <p>December 10 Financial Decision Makers Roundtable 8:00 a.m. - 10:00 a.m. Hilton Hasbrouck Heights</p> <p>December 16 EBC Environmental Technology Workshop 11:30 a.m. - 2:00 p.m. CIANJ Conference Room, Paramus</p>
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For more events information or to register online, please visit www.cianj.org or call Member Services at (201) 368-2100.

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continued on page 36



Steven T. Senior, Esq.

continued from page 34

ing on environmental issues since ECRA or ISRA. By identifying creative solutions, effectively negotiating with NJDEP and other stakeholders, and holding the line on the clients' fundamental principles, Riker Danzig furthered the interests of Coalition members. Now, LSRPs will be licensed by an independent Board composed primarily of licensed peers. LSRPs are authorized to exercise independent

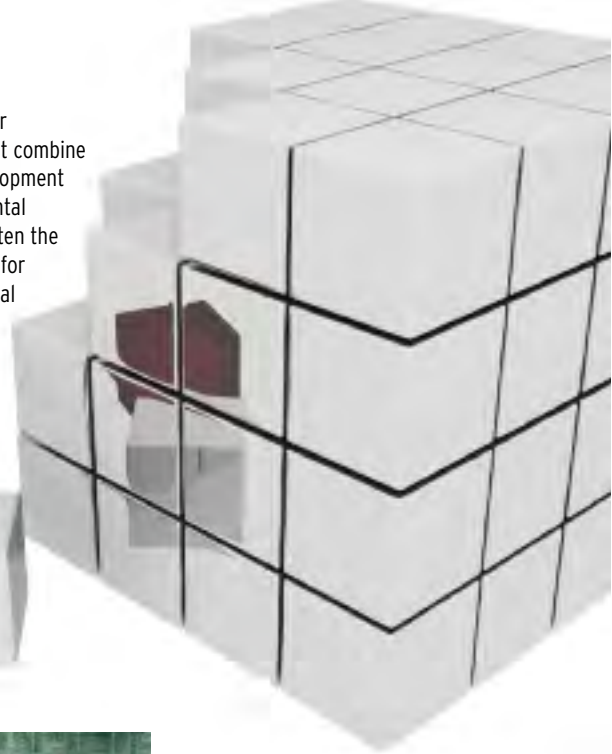
professional judgment and issue "RAOs"—the statutory equivalent of an NEA letter. Penalties are significantly reduced. While the ultimate success of the program remains to be proven, Riker Danzig's work dramatically improved the LSRP program for the Coalition members as well as their clients.

Wolff & Samson

By Robert Crespi, Partner

In May 2008, construction began on a multi-family, 55 and older, affordable housing building for families in Sussex County. Prior to construction, metals above standard were discovered in the soil on the site. The developer engaged an environmental consultant to oversee the cleanup under the oversight of the NJDEP. However, 16 months later, the matter was not resolved and the NJDEP issued a Notice of Deficiency for improperly

Piecing together agreements that combine economic development and environmental protection is often the perfect tasking for an environmental law practice.



Robert Crespi, Esq.

addressing the presence of the metals. As a result, the developer was faced with a potential catastrophic delay, and retained Wolff & Samson to navigate the site through the system. We immediately met with the NJDEP case team and were able to forge an agreement as to a remediation approach that would

be protective of health and the environment, and facilitate an economically practical solution. NJDEP quickly reviewed and approved the institutional and engineering controls necessary to remediate the site, and construction was completed in accordance with the NJDEP approved controls. During this time, Wolff & Samson also interacted with municipal officials to facilitate receipt of the local approvals necessary to obtain the Certificate of Occupancy. The end result was a successful opening of a project that benefited the community and its new residents. ■

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