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New Jersey Environmental Law's Top 10 of 2008

Lewis Goldshore and Marsha Wolf

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2008 was another eventful year for New Jersey environmental law and for the state's environmental lawyers. Selecting and ranking the top 10 proved to be no easy task. Reasonable minds may differ on the items which have been selected.

10. **Park Dedication:** The only reason that *Township of Middletown v. Simon*, 193 N.J. 228 (2008), made the list because it was a Supreme Court ruling. It involved the nature of the dedication process and should also be of interest to land use and municipal attorneys, as well as those who engage in tax sale foreclosure process.

The Court found that a lot created in a 1929 subdivision and designated for park purposes could be accepted by a municipality 75 years later. The belated acceptance was validated by the Court despite the fact that the holder of a tax sale certificate had foreclosed and acquired title to the property. For additional discussion of the ruling and its implications, see L. Goldshore and M. Wolf, "Delayed Acceptance of Dedicated Parkland Upheld," 191 *N.J.L.J.* 975 (Mar. 17, 2008).

9. **Environmental Insurance:** There has never been a respite when it comes to environmental insurance. New Jersey has earned its reputation for being the forum of choice for insureds and the forum to be avoided at all costs by insurers.

The general rule was reflected in *Sensient Colors, Inc. v. Allstate Ins. Co.*, 193 N.J. 373 (2008), aff'g 388 N.J. Super. 374 (App. Div. 2006), where the Court rejected a carrier's attempt to invoke the first-filed doctrine in an environmental insurance dispute. The decision provided a roadmap for establishing a comity stay or dismissal argument.

The moving party has the burden to establish that the first-filed action involves substantially, but not necessarily exactly, the same parties, claims and legal issues. The burden then shifts to the proponent of the second-filed action to demonstrate the presence of special equities — that is, that adequate relief would not be available in the first-filed jurisdiction.

The *Sensient* Court was heavily swayed by the special equities — the need to assure adequate resources to remediate contaminated property situated in New Jersey. For a review of the case, see L. Goldshore and M. Wolf, "The Race to the Courthouse," 191 *N.J.L.J.* 514 (Feb. 18, 2008). But for a ruling where the court applied the *Sensient* comity analysis and concluded that special equities required dismissal in favor of the second-filed Pennsylvania action, see *Century Indemnity Co. v. Mine Safety Appliances Co.*, 398 N.J. Super. 422 (App. Div. 2008).

8. Permit Extension Act: The legislature also played an important role in shaping environmental policy in 2008. This was evidenced by its adoption of the Permit Extension Act of 2008 (PEA-08), N.J.S.A. 40:55D-136.1 et seq., designed to stimulate the state's economy. It applied to 25 categories of environmental and land use-related approvals, including those issued by the DEP, the Department of Transportation and county and municipal entities.

In general, for approvals in existence between January 1, 2007, and July 1, 2010, the expiration of the period of approval was automatically suspended for the extension period. But the PEA-08's tolling did not extend the governmental approval more than six months beyond July 1, 2010. In addition, several categories of approvals were carved out from qualification for extension.

As a result of the exceptions, PEA-08 excluded as many projects from coverage as it qualified for extension. For a more detailed discussion of the statute, see L. Goldshore and M. Wolf, "Permit Extension Act Scaled Back," 193 *N.J.L.J.* 258 (July 28, 2008).

7. Who Pays to Save the Trees? A number of municipalities throughout the state have adopted tree replacement ordinances. In general, these local laws require developers to plant new trees to offset those which are removed during the development process. Alternatively, the developers are required to make payments to a municipal escrow fund to provide the resources for this purpose.

The validity of this approach was challenged in *N.J. Shore Builders Ass'n v. Tp. of Jackson*, 2007 WL 2005358 (App. Div.), certif. granted 193 N.J. 586 (2008). The case has been argued and a ruling is expected shortly. The Court is also considering whether municipalities are authorized to require developers to set aside land for common open space or recreational purposes or, in the alternative, to pay an assessment for those purposes. See *N.J. Shore Builders Ass'n v. Tp. of Jackson*, 401 N.J. Super. 152 (App. Div.), certif. granted 197 N.J. 14 (2008).

6. Threatened & Endangered Species: DEP has increased its interest in protecting threatened and endangered species. While there had been some discussion concerning new legislation to achieve this objective, for the time being the department has increased the level of protection through existing programs.

In *ZRB, LLC v. DEP*, 403 N.J. Super. 531 (App. Div. 2008), the Appellate Division found that DEP was authorized by the Freshwater Wetlands Protection Act and the New Jersey Endangered and Nongame Species Conservation Act to designate and protect threatened as well as endangered species. N.J.S.A. 13:9B-1 et seq.; 23:2A-1 et seq. The appeals court also upheld the denial of a statewide general permit application based on the wetlands being of exceptional resource value.

5. Licensed Site Remediation Professional Program: It has become clear that DEP's staff is unable to

oversee the remediation of the state's growing list of contaminated sites. A fundamental change in the current system has to be made to assure that these properties are returned to productive use in a timely manner.

Senate No. 1897 and *Assembly No. 2962*, the Site Remediation Reform Act, were designed to achieve that objective by establishing a licensed site remediation professional (LSRP) program within DEP. According to the legislative statement: "[a]ny person who initiates a remediation of a contaminated site at least 180 days after the date of enactment . . . must hire a licensed site remediation professional to perform the remediation." An exception from the LSRP requirement is provided for most sites where remediation commenced prior to the statute's enactment. However, that curtain will drop in three years when LSRPs will be required for all remediation.

While the Site Remediation Reform Act is on the brink of becoming law, the unanswered question that remains is whether it will result in the achievement of the desired objectives.

4. **DEP Public Access Rules Invalidated:** The DEP's Public Access rules were highly controversial and were opposed by many shore municipalities. In *Boro. of Avalon v. DEP*, 403 N.J. Super. 590 (App. Div. 2008), the Appellate Division invalidated two of its provisions. The state has sought review in the Supreme Court but it is unlikely that the ruling will be overturned.

The appeals court set aside DEP rules that required municipalities to allow public access to tidal waterways and shores "at all times" unless the department allowed closure. It also rejected a rule that required municipalities that sought Shore Protection Fund appropriations to provide additional parking spaces and restroom facilities in proximity to the oceanfront. For a detailed discussion of the ruling, see L. Goldshore and M. Wolf, "Down the Shore," 195 *N.J.L.J.* 38 (Jan. 19, 2009).

3. **Highlands Update:** Both the Highlands Council and the DEP have been busily implementing the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq. The Council's Regional Master Plan (RMP) was finally approved on July 17, 2008.

The conflict between the provision of affordable housing and the protection of the highlands region resulted in Governor Corzine's issuance of Executive Order 114 on September 5, 2008. The executive order addressed the implementation of the RMP and coordination with the Council on Affordable Housing (COAH). The Highlands Council and COAH approved a Memorandum of Understanding (MOU) to assist in providing affordable housing in the Highlands region.

The Supreme Court also found that it was necessary for a highlands property owner to exhaust administrative remedies before perfecting its taking claim. *OFP v. State of New Jersey*, 395 N.J. Super. 571 (App. Div. 2007), aff'd aff'd o.b. 197 N.J. 418 (2008). This required claimants to seek takings waivers under the detailed, lengthy and costly procedures set forth in the highlands rules. For additional discussion of the ruling, see L. Goldshore and M. Wolf, "Constitutionality of Highlands Act Upheld," 189 *N.J.L.J.* 1054 (Sept. 17, 2007).

2. **Climate Change:** Climate change has emerged as an important, if not the overriding, consideration that will shape future environmental policy. The presidential candidates' positions on energy, climate change and the environment were reviewed in L. Goldshore and M. Wolf, "Candidates Differ on Energy-

Climate-Environmental Issues," 194 *N.J.L.J.* 378 (Oct. 20, 2008). The Obama team clearly expressed a deeper commitment to these issues. It remains to be seen how that vision will be translated into specific policy initiatives. But recent moves by the new administration indicate that these issues are being taken very seriously and were not just "campaign talk."

On the state level, the Board of Public Utilities (BPU) approved an energy master plan that incorporated climate change objectives and programs. BPU President Jeanne Fox described New Jersey's efforts to address these challenges in L. Goldshore, "New Jersey's Alternative Energy/Climate Change Efforts," 194 *N.J.L.J.* 751 (Nov. 24, 2008).

1. The Changing of the Guard at DEP; Environmental Protection in a Troubled Economy: The most significant event of the past year was the departure of DEP Commissioner Lisa P. Jackson to assume the post of Administrator of the U.S. Environmental Protection Agency. She was replaced by Mark N. Mauriello, a seasoned and highly respected member of the department's staff.

The challenges for Commissioner Mauriello particularly in troubled economic times are daunting. It is anticipated that the new Commissioner will perform admirably but it is unrealistic to believe that government will be able to "do more with less." Under these circumstances, the real questions are what will be the agency's priorities and which initiatives will be targeted for retrenchment. It's too early to tell but it will be in the interest of the environmental bar to closely track these unfolding events.

Goldshore is a partner at Goldshore, Cash & Kalac of Lawrenceville. His practice is devoted to environmental, land use and municipal law. Goldshore and Wolf are co-authors of "New Jersey Environmental Law" (ICLE 2003), and Goldshore is a co-author of "New Jersey Brownfields Law," published by New Jersey Law Journal Law Books. Their column appears regularly in the Law Journal.