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A FLOOD OF ENVIRONMENTAL LEGISLATION: AN ANALYSIS OF THE NEW JERSEY EXPERIENCE, 1970-1975

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The environmental protection movement which captured national attention in the early 1970's had a distinct impact on the State of New Jersey. While the State traditionally has had more than its fair share of environmental problems,[1] an examination of pre-1970 developments indicates that it was also well ahead of many other jurisdictions in the adoption of remedial statutes. It was in this context that New Jersey adopted more than two hundred new laws between 1970 and 1975 which directly concerned environmental protection. The purpose of this article is to examine the legislative response by identifying the core elements of the program and describing their provisions.

Historical Overview

Some historical perspective is required to appreciate the events which occurred during the period under consideration. A review of the statutes adopted in colonial New Jersey indicates that there were a number of attempts to remedy environmental abuses. One of the first was a measure designed to control water pollution passed in 1755.[2] Under this act the Governor, Council and General Assem-

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1 As early as 1880, the State Board of Health observed: "Already our chief routes to New York City are tainted with questionable smells, and the refuse factories which are driven from the cities of other states, found refuge within our limits." STATE BOARD OF HEALTH: 1880 Report, 23.

2 Law of August 20, 1755, [1773-1821] N.J. Laws 22.

bly of the colony of New Jersey agreed that no person should be permitted to throw "brush or other filth" into the navigable waters under forfeiture of five pounds. In addition, the statute contained a modern remedy. It required the responsible person to ". . . immediately remove the brush or rubbish . . .".[3] Numerous other pollution control laws were adopted during the following 200 years. However, with few exceptions,[4] enforcement of the early pollution control laws was apparently ignored.

New Jersey began to experience severe adverse effects from urbanization and industrialization by the second half of the nineteenth century. The lack of adequate planning for waste disposal and water supply in the developing urban areas resulted in serious health and sanitation problems. The origin of the modern environmental movement can be traced to the public health and conservation efforts which developed in response to these conditions. As early as 1866, the New Jersey Legislature indicated its concern for public health conditions. In that year it appointed a State commission to report on general sanitary conditions and the possibility of preventing epidemic diseases.[5] Thereafter, the State Board of Health was established and its annual reports in the 1970's and 1880's described the existence of serious environmental health problems associated with inadequate disposal of waste, water pollution and air pollution.[6]

The law of nuisance was the principal legal approach utilized in New Jersey to control conditions offensive to the public health during the nineteenth and first half of the twentieth centuries. Both private persons and public agencies brought actions grounded on this theory. While some of these lawsuits appeared to have favorable results, a number failed for procedural defects or the courts' unwillingness to obstruct industrial operations.[7] Another technique which was utilized was the adoption of police power ordinances by municipalities. These local provisions were ordinarily enacted to remedy a specific problem. Their regional impact

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3 Law of August 20, 1755, *Id.* A more recent statute requiring removal is the New Jersey Water Quality Improvement Act of 1971. N.J. Stat. Ann. 52:10–23.1 *et seq.* The statute was construed in Lansco, Inc. v. Dept. of Env. Prot., et al., 138 N.J. Super. 275 (Ch. Div. 1975).

4 *See, e.g.,* State v. American Forcite Powder Mfg. Co., 50 N.J.L. 75 (Sup. Ct. 1887); State Board of Health v. Ihnken, 72 N. J. Eq. 865 (E&A 1907).

5 Act of April 5, 1866, c. 444, L. 1866. This Commission prepared the first general sanitary report directed by the Legislature

6 *See, e.g.,* STATE BOARD OF HEALTH: 1877 Report, 28.

7 *See, e.g.,* Davidson v. Isham, 4 N.J. Eq. 186 (Ch. 1852). *See* Cowan, *Air Pollution Control in New Jersey,* 9 RUTGERS L. REV. 609, 626 (1955).

was further limited by sporadic enforcement.[8] The role of the State government in direct enforcement activities was comparatively minimal until the 1940's, when the new Constitution was passed, State budgets were increased, and federal financial assistance became more readily available.

The crowded and unhealthful conditions of the cities also contributed to the growth of the conservation movement. The interest in retaining open space was recognized on the national level in 1872 by legislation establishing Yellowstone National Park.[9] It gained substantial impetus during the administration of President Theodore Roosevelt when establishment of the Forest Service was proposed in 1905.[10] A number of similar conservation measures were adopted in New Jersey at about this time including the creation of the first forest park reservation.[11]

During the first half of the twentieth century, the State acquired additional park and forest lands. In addition to purchase and eminent domain, property was occasionally obtained by grants and gifts from individual donors.[12] These holdings were augmented by lands acquired from the proceeds of hunting, trapping and fishing licenses.[13] In 1961, the public recognized the importance of the acquisition of open space and the requirement of providing substantial funding. The first Green Acres Bond Act was approved and it authorized the issuance of $60 million of general obligation bonds.[14] This statute enabled the State to pur-

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8 *See, e.g.*, Atlantic City v. France, 74 N.J.L. 389 (Sup. Ct. 1907), aff'd. 75 N.J.L. 910 (E&A. 1908); Bd. of Health of Weehawken Tp. v. N.Y. Central R. Co., 4 N.J. 293 (1950).

9 16 U.S.C. §§ 21, 22 (1970).

10 16 U.S.C. § 472 (1970).

11 N.J. REV. STAT. 13:8–1 *et seq.* The first component of the New Jersey system was Bass River State Forest acquired in 1905.

12 N.J. STAT. ANN. 13:8–28 expressly permitted the State to accept a bequest from the estate of Governor Foster M. Voorhees for foresting purposes. The Estate, Hills Acres, is now Voorhees State Park.

13 N.J. REV. STAT. 23:3–11 establishes a special fund known as the "public shooting and fishing ground fund." The proceeds of the fund are dedicated to improving public hunting and fishing and the acquisition of land and water areas for these purposes.

14 The State acquired 90,000 acres and local governments acquired 17,000 acres from the proceeds of the 1961 Green Acres Bond Act, L. 1961, c. 46. In 1971, an $80 million refunding of the Green Acres Program was approved, L. 1971, c. 165. An additional 34,000 acres were acquired by the State and 16,325 acres were acquired by local governments. In 1974 the voters approved a $200.00 continuation of the Green Acres Program and for the first time authorized the issuance of bonds for park development as well as open space acquisition. The procedures for acquisition and development were specified by the Legislature, N.J. STAT. ANN. 13:8A–1 *et seq.* *See* City of Elizabeth v. Sullivan, 125 N.J. Super. 569 (App. Div. 1973) where the Commissioner of Environmental Protection was found to have broad discretion concerning the awarding of grants under the Green Acres Program.

chase substantial areas for public recreation and conservation. It also established a precedent for the financing of future acquisitions.

Air Pollution Control As A Model

For several reasons, not the least being its visibility, air pollution control was in the forefront of the environmental movement. The State became seriously involved in the abatement of this problem in 1954 when the Legislature adopted one of the first state-wide air pollution control statutes in the nation.[15] This action was taken in response to dramatic incidents, the inability of municipalities to address the problem and the general deteriorating quality of the air.[16] The history of the implementation of this statute provides helpful insight concerning the environmental legislation adopted in the early 1970's.

The 1954 Air Pollution Control Act constituted significant recognition of the need to control an environmental problem. However, it contained serious internal weaknesses. The statute defined "air pollution" in broad terms but did not contain specific standards of allowable conduct.[17] The power to adopt the necessary implementing regulations was delegated to an extra-agency body, the Air Pollution Control Commission. This nine member commission consisted of representatives of government, business, industry and the public.[18] The statute also established a cumbersome enforcement mechanism characterized by the objective of "conference, conciliation and persuasion." The results of the first ten year's experience with this law were dismal. During this period five weak regulations were adopted, five cases prosecuted in court, an average of ten State employees were assigned to air pollution control activities, and air pollution intensified rather than abated.[19] In 1967,

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15 N.J. STAT. ANN. 26:2C–1 *et seq. See,* Cowan, *Air Pollution Control in New Jersey,* 9 Rutgers L. Rev. 609 (1955); Moran, *Air Pollution Control Act and Its Administration,* 9 Rutgers L. Rev. 640 (1955).

16 For a discussion of the events leading to the adoption of the New Jersey statute, see Cowan, *supra* note 15, at 620–622.

17 N.J. STAT. ANN. 26:2C–2: "Air pollution" was defined in the 1954 statute (L. 1954, c. 212, § 2) in terms of its effects: "The presence in the outdoor atmosphere of substances in quantities which are injurious to human, plant or animal life or to property or unreasonably interfere with the comfortable enjoyment of life or property . . ."

18 N.J. STAT. ANN. 26:2C–3. Three members of the Commission were governmental officials, one member was appointed to represent the general public, and five were selected from nominees of specific interest groups.

19 SULLIVAN, WHERE DOES NEW JERSEY GO FROM HERE IN AIR POLLUTION CONTROL?—REPORT OF PLANNING COMMITTEE, NEW JERSEY AIR POLLUTION CONTROL COMMITTEE, July 18, 1966.

the Legislature became impatient with the lack of progress and amended the law by assigning direct broad rule-making authority to the Department of Health to prevent, as well as control air pollution, streamlining enforcement procedures and providing realistic penalties for violations.[20] This approach was challenged and upheld in two landmark State Supreme Court decisions.[21]

The Turning Point: 1970

The public's dissatisfaction with the quality of the environment, and its resolve to remedy offensive conditions, reached a high point in 1970. On January 13, 1970, Governor [now Chief Justice] Richard J. Hughes presented his eighth and last annual message to the Legislature. In his discussion concerning the importance of environmental protection to the citizens of New Jersey, he noted that:

> Few tasks before the Legislature in the years and decades ahead will require more resourcefulness and political courage.[22]

Similar sentiments were reflected in Governor William T. Cahill's Inaugural Address seven days later in which he clearly expressed the need to take prompt remedial action:

> I am impatient with our inability to prevent the erosion and pollution of our most prized natural resources, the seashore and beaches of New Jersey. I am apprehensive and deeply troubled by the danger to health from the continued and increased pollution of air, streams, rivers and even our ocean.[23]

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[20] N.J. STAT. ANN. 26:2C-19 (1975-1976 Supp.); ch. 106 [1967] N.J. LAWS (codified) at N.J. STAT. ANN. 26:2C-1 *et seq.* (1975-1976 Supp.). The scope of the Act was limited by the definition of "air pollution." *See* note 17, *supra.* It was expanded to allow the State to prevent conditions which "tended to cause" adverse effects. The earlier approach appeared to require forbearance until the adverse condition occurred before remedial action could be taken.

[21] Department of Health v. Owens-Corning Fiberglas Corp., 100 N.J. Super. 366 (App. Div. 1968), aff'd. 53 N.J. 248 (1969); Consolidation Coal Co. v. Kandle, 105 N.J. Super. 104 (App. Div. 1969), aff'd. 54 N.J. 11 (1969).

[22] Governor Richard J. Hughes, Annual Message, January 13, 1970. FITZGERALD'S LEGISLATIVE MANUAL, 1970, p. 798.

[23] Governor William T. Cahill, Inaugural Address, January 20, 1970, FITZGERALD'S LEGISLATIVE MANUAL, 1970, p. 805. The development of New Jersey's environmental program paralleled and in some ways preceded efforts at the federal level.

The enactment of a wide variety of remedial legislation was to be one of the priorities and achievements of the Cahill administration.

With the passage of time Governor Hughes' prediction proved to be extremely accurate. During the first four years of the decade, most proposed environmental protection legislation was extremely popular. Legislators competed to sponsor pollution control measures with the unfettered support of their constituents. However, by 1974 questions were raised concerning the costs of environmental controls and the effect on the State's ability to retain and attract new industry. In subsequent years, approval became more difficult to obtain.

Environmental Legislation: 1970-1975

More than 200 environmentally related measures were adopted by the Legislature between 1970 and 1975. Most of these addressed local problems[24] or specific interest groups,[25] leaving approximately one dozen laws which constituted the core of the State's environmental program. The elements of the program do not fall into neat categories but, for discussion purposes, can be assigned to three nonexclusive and somewhat overlapping subdivisions. The first group consists of those statutes which concern governmental organizations or institutions designed to protect the environment. Laws which apply to the control of various categorical environmental issues are discussed in the second subdivision. The remaining group is composed of those measures which expressly relate to land use in areas of critical environmental concern.

(A) Statutes Concerning Governmental Organizations and Institutions.

The most critical statute adopted during the period under discussion was the Department of Environmental Protection Act of 1970.[26] This Act consolidated the State's environmental protec-

[24] *Eg.*, validating acts for local sewerage bond issues. Validating acts are normally adopted to correct an error in the procedure for the establishment of an authority or in the issuance of its bonds. For an example of a sewerage authority validating act see N.J.S.A. VAL:34–1.2.

[25] *E.g.*, an act repealing bounties paid by local governments for foxes and woodchucks, c. 164 [1975] N.J. LAWS profiled the bounty system which started in 1675. *See* Alpaugh, *Bounty System in New Jersey*, NEW JERSEY OUTDOORS, Vol. 1, No. 2 (March/April 1974), p. 5.

[26] N.J. STAT. ANN. 13:1D–1 *et seq.* For a comparative analysis of various state environmental agencies, see HASKELL & PRICE, STATE ENVIRONMENTAL MANAGEMENT: CASE STUDIES OF NINE STATES (1973).

tion efforts in one strong agency and assigned to it the authority to administer and implement the relevant statutes and regulations. The proposal was signed into law by Governor Cahill on April 22, 1970 and established the tenor for pollution control for the following three and a half years.

Prior to 1970, the authority for the administration of environmental protection statutes at the State level was divided principally between two agencies, the Department of Health (DOH) and the Department of Conservation and Economic Development (DCED).[27] The Division of Clean Air and Water in the DOH[28] was responsible for the enforcement of the State's pollution control laws and during the Hughes' administration had acquired a national reputation for innovative and vigorous enforcement. The management and development of the State's land and water resources were assigned to the DCED. The agency's dual mission resulted in a difficult decision-making process. While it had obtained a measure of success in acquiring sites for outdoor recreation and water supply, it had been subject to criticism because of the assumed practice of internally balancing competing interests. The solution to this dilemma necessitated a realignment of the functions within the executive branch and the creation of one agency whose sole mission would be environmental advocacy. Governor Cahill decided to end the bureaucratic dichotomy and proposed the legislative establishment of the Department of Environmental Protection (DEP) by merging the pollution control functions of DOH with the resource management activities of DCED. The important economic development and promotion functions were continued and assigned to the Department of Labor and Industry.[29]

An examination of the Department of Environmental Protection Act of 1970 indicates that the legislative draftsmen chose a relatively simple approach to the creation of the agency. They did not elect to establish an entirely new department; they merely provided for the reorganization of the powers and structure of the DCED. The department was reconstituted by legislatively

[27] N.J. STAT. ANN. 13:1B–1 *et seq.* The Department of Conservation and Economic Development was established in 1948 by the consolidation of the Department of Conservation and the Department of Economic Development.

[28] Established by Executive Notice No. 109, dated February 16, 1967, and Executive Notice No. 132, dated July 1, 1968 of the State Commissioner of Health. In 1970, this agency was reconstituted the Division of Environmental Quality. N.J. REV. STAT. 13:10–5.

[29] N.J. STAT. ANN. 13:1D–10, 13:1D–18 (1975-1976 Supp.).

transferring certain functions to it and assigning functions considered incompatible to other agencies. This technique resulted in a compact statute which assured continuity and eliminated unnecessary confusion in the transfer of powers to the new department.

A decision was made in drafting regarding the assignment of additional plenary powers to the DEP. The statute could have been limited to the reallocation of preexisting authority or alternatively expanded by the addition of substantial new powers. It appears that a middle course was chosen. While the principal purpose was reorganization, the plenary powers of the agency were also enlarged. A broad range of general authority was contained in the Act, including the formulation of comprehensive policies for the conservation of natural resources, the promotion of environmental protection and the prevention of pollution.[30] The department was vested with broad authority to initiate complaints to abate offensive conditions. It does not appear that the full measure of the lengthy enumeration of powers contained in this section was intended to be implemented at once. Rather, the list could serve as a residuum of authority as the agency matured and became involved in diverse activities. Another feature of the act worthy of note is the absence of standards for assessing agency performance. Although this is not an unusual feature, it may well be desirable when the Legislature embarks on a new course.

A second statute concerning governmental organizations authorized the establishment of local environmental commissions. In 1968, a statute was adopted enabling municipal governing bodies to appoint municipal conservation commissions to advise them on matters pertaining to natural resources.[31] The law, similar to provisions enacted in several New England states, was amended in 1972 by redesignating the agencies as environmental commissions and widening their scope to include a broader area of interest.[32] A modest grant-in-aid program administered by DEP

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30 N.J. STAT. ANN. 13:1D–9 (1975-1976 Supp.).

31 N.J. STAT. ANN. 40:56A–1 *et seq.* The statute provides that commissions may "conduct research into the use and possible use of open lands of the municipality and may coordinate the activities of unofficial bodies." Many commissions participate in a wide range of municipal decisions which have an impact on the environment.

32 C. 35 [1972], N.J. LAWS, N.J. STAT. ANN. 40:56A–6 provided that the commissions could make recommendations to the municipal governing body on all environmental issues.

was instituted to assist the commissions.[33] However, as a result of recent budgetary constraints funding for this program has been discontinued.

In response to local citizen support, many municipalities throughout the State established environmental commissions. There were 233 commissions in existence by December 31, 1974 which were involved in providing advice on a broad range of activities including land use, disposal of wastes and water supply. Some agencies have been particularly effective in persuading local government to attempt to reconcile growth objectives and environmental constraints.[34]

In addition to adopting statutes directly concerning governmental organizations, the Legislature examined the effect of the tax structure on environmental quality. The often-cited example of this interrelationship is the State's heavy reliance on the local property tax.[35] It has influenced local governments to engage in ecologically unsound land use practices. In an attempt to stabilize tax rates, land unsuitable for intensive development has nevertheless been assigned to priority development zones.[36] On the other hand, the tax system can be structured to foster socially desirable objectives, including protection of the environment. Two statutes adopted during the period under discussion were designed to achieve this goal.

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33 The Environmental Aid Act, N.J. STAT. ANN. 13:1H-1 *et seq.* (1975-1976 Supp.), adopted in 1972, authorized 50% matching grants of up to $2,500 to assist environmental commissions and other local environmental agencies. Environmental commissions have assumed the roles of constituent groups and at times, critics of the DEP and thereby assisted in the implementation of State environmental programs.

34 For example, an extensive environmental inventory and regulatory scheme was prepared under the direction of the Medford Township Environmental Commission. In So. Burl. Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151 (1975), the State Supreme Court noted that the balance between land use regulations and environmental concerns is not easily established: "(T)o have a valid effect, the danger and impact must be substantial and very real . . . not simply a makeweight to support exclusionary housing measures or preclude growth—and the regulation adopted must be only that reasonably necessary for public protection of a vital interest." 67 N.J. at 186-187. *See also* Housing and Suburbs, New Jersey County and Municipal Government Study Commission, October, 1974.

35 *See Mt. Laurel, supra* note 34, at 171. "This policy of land use regulation [the exclusion of low and moderate income families] for a fiscal end derives from New Jersey's tax structure, which has imposed on local real estate most of the cost of municipal and county government and of the primary and secondary education of the municipality's children."

36 The over zoning for industry is a common fiscal zoning practice. In *Mt. Laurel,* 29.2% of the township was zoned for industry. *Mt. Laurel, supra,* note 34, at 162. For a description of the farmland stability program, *see* Report of the Blueprint Commission on the Future of New Jersey Agriculture, April, 1973.

The New Jersey Pollution Control Financing Law empowered county governments to establish authorities with power to issue tax exempt industrial pollution control bonds.[37] The statute, which was substantially similar to provisions adopted in other jurisdictions, was designed to take maximum advantage of the federal tax law exemption for such financing.[38] Its purpose was to reduce the cost of industrial borrowing for pollution control equipment by providing access to lower interest rates ordinarily available in the "municipal" bond market. Some critics of the approach contended that it would make it more difficult and costly for government to borrow for more traditional undertakings, and, as a result, it has encountered resistance in other jurisdictions.[39] However, industrial pollution control financing has been successfully utilized in New Jersey. It is likely that this system of financing would be sustained if it were challenged.[40]

The second tax measure provides exemption from local property tax for certain privately held open space. Over the years, several conservation organizations had been able to obtain donations of open space but were in danger of losing the tracts because of increasing local property tax rates. In 1974, Governor Brendan T. Byrne supported a bill granting tax exemption for such holdings. The proposal contained safeguards to prevent abuse and inequities. To qualify for exemption, the lands were required to be used exclusively for conservation and recreation purposes; the owner had to be a qualified nonprofit organization and provisions had to be made for reasonable public access.[41] The bill was approved and during its first year more than 8,000 acres qualified for inclusion in the program.[42]

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37 N.J. STAT. ANN. 40:37C-1 (1975-1976 Supp.) *et seq.* In 1975, "The New Jersey Economic Development Authority Act," N.J. STAT. ANN. 34:1B-1 (1975-1976 Supp.) *et seq.*, was amended to permit the Authority to engage in pollution control financing. C. 253 [1975] N.J. LAWS.

38 26 U.S.C.A. § 103 (c) (4) (E) and (F).

39 Reitze, Tax Bonuses Don't Halt Pollution, in Arnold W. Reitze, Jr., Environmental Law, Vol. I (1972), One-75. *See e.g.*, Port of Longview, Cowlitz Cty. v. Taxpayers, etc., 84 Wash. 2d 475, 527 P.2d 263 (Wash. Sup. Ct. 1974); Stanley v. Department of Conservation, 284 N.C. 15, 199 SE 2d 641 (N.C. Sup. Ct. 1973), but see contra State ex rel. Furon Elec. Coop., Inc. v. State Env. I.A., 518 SW 2d 68 (Mo. Sup. Ct. 1975).

40 *See* N.J. Sports & Exposition Authority v. McCrane, 61 N.J. 1 (1972) in which the constitutionality of the financing of Meadowlands Sports Complex was upheld.

41 N.J. STAT. ANN. 54:4-3.63 (1975-1976 Supp.) *et seq.* An act concerning exemption from taxation of real property owned by certain nonprofit corporations and supplementing chapter 4 of Title 54 of the Revised Statutes.

42 In 1975, approximately 8,810 acres was qualified for tax exemption pursuant to this program. The property was distributed in 37 municipalities and 14 counties.

The final statute included in this subdivision is unique in the environmental area. In 1975, Governor Byrne, in response to unacceptable delays in processing environmental permit applications, recommended a proposal to expedite the process of decision-making by the DEP with regard to certain construction permits.[43] The bill provided that the department must rule on requests for certain enumerated permits within 90 days of receipt of a complete application. In the event that a decision is not made within the specified period the application is considered to be approved. Since this statute has recently become effective, it is not possible to gauge its impact on the application process at this time. While its objectives appear to be desirable, adequate funding will be required to assure the effectiveness of the program and prevent its purpose from being frustrated.

(B) Categorical Environmental Issues.

In the late 1960's, environmental protection was considered in rather distinct categories. The governmental response to air pollution, water pollution, solid waste disposal, community noise and pesticides was not substantially integrated, and the lack of coordination led to some dysfunctional results. For example, the control technique to reduce the omission of solid particulate matter into the atmosphere might be to require the installation of a "scrubber". Without careful planning, utilization of this device could cause water pollution.

The statutes adopted during this period were directed at specific categories of pollution and often did not seriously consider other interrelated issues. This is illustrated in the legislative response to the solid waste problem, which has been somewhat of a stepchild of the environmental protection movement. It has a less active constituency and has been funded at lower levels than several of the other programs.[44] While this may have

[43] c. 232 [1975], N.J. LAWS (codified, but not yet compiled as c. 13:1D–29 *et seq.*) The 90-day processing requirement applies to permits for waterfront development, N.J. REV. STAT. 12:5–3; wetlands permits N.J. STAT. ANN. 13:9A–1, *et seq.* (1975-1976 Supp.); coastal area facility review act permits, N.J. STAT. ANN. 13:19–1, *et seq.* (1975-1976 Supp.); encroachment permits, N.J. REV. STAT. 58:1–26; and sewer extension permits, N.J. REV. STAT. 58:11–10.

[44] For fiscal year 1976-77, the recommended budget for solid waste programs in the State is $383 thousand, while air pollution programs may receive a proposed $3 million. The Court in Southern Ocean Landfill, Inc. v. Mayor and Council of Ocean Tp., 64 N.J. 190 (1974) commented: "No statewide plan for solid waste management has been shown and we assume none exists . . . In 1970, the Legislature declared that a solid waste crisis existed in this State. Three and one-half years have elapsed since then and we have not resolved the admitted crisis." 64 N.J. at 195-196.

been modified to some extent by the interest generated in community recycling, prior to 1970 there was comparatively little government attention devoted to solving the complex waste problem.

The State's recognition that the situation had reached crisis proportions was indicated by enactment of the Solid Waste Management Act (1970).[45] A review of the statute's essential elements indicates that it refined several techniques found in the air pollution control statute and was the apparent drafting model for a number of subsequent environmental statutes. The descriptive short title was followed by a compact declaration of policy. This section was designed to assist a reviewing court to favorably interpret the statute. It set forth the justification for the statute and the need for direct regulation and governmental planning to manage the solid waste problem.[46] The next section contained definitions of terms used in the statute. The bill drafters elected to supply a minimum of special definitions. However, the critical term "solid waste" which delineated the scope of the statute was broadly defined.[47] The essential provisions were contained in section 6, where the DEP was delegated very expansive authority to adopt solid waste regulations and to develop a State-wide solid waste management plan.[48]

It might be argued that the statute was too concise in describing these important responsibilities. The Legislature could have provided additional direction concerning the methodology for implementing these statutory provisions. Rather than merely establishing a framework for the adoption of future regulations and reciting the need for a management plan, the Act could have identified

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45 N.J. STAT. ANN. 13:1E–1 *et seq.* (1975-1976 Supp.). For a description of the problem and recommended solutions, *see* State of New Jersey County and Municipal Government Study Commission, *Solid Waste: A Coordinated Approach*, September, 1972. On February 23, 1976, Governor Byrne signed a comprehensive revision to the State's solid waste statutes. L. 1975, c. 326.

46 N.J. STAT. ANN. 13:1–2 (1975-1976 Supp.) See Solid Waste Industrial Council v. New Jersey Department of Environmental Protection, Docket No. A-3635-73 (App. Div., February 23, 1976) in which a challenge to the solid waste regulations was rejected.

47 N.J. STAT. ANN. 13:1E–3 (1975-1976 Supp.). This technique is found in several of New Jersey's environmental laws. *See, e.g.*, "air pollution," N.J. STAT. ANN. 26:2C–2 (1975-1976 Supp.); "noise," N.J. STAT. ANN. 13:1G–3 (d) (1975-1976 Supp.); "pesticide," N.J. STAT. ANN. 13:1F–3 (b) (1975-1976 Supp.).

48 N.J. STAT. ANN. 13:1E–6c. "Develop and formulate a State-wide management plan and guidelines to implement the plan; and to the extent practicable, encourage and assist in the development and formulation of regional, county and inter-county solid waste management plans . . ."

those issues requiring immediate control and the elements of the plan. This could have been accomplished without impeding flexibility and might have assisted the DEP in establishing priorities.[49]

The Solid Waste Management Act (1970) established an extra-agency council to consult with the DEP. Its powers, similar to the Clean Air Council, were limited to an advisory status.[50] The enforcement sections of the Act specified realistic penalties and efficient procedures similar to the statutes concerning air pollution control.[51] Another issue which received considerable attention was the relationship between State and local regulation of the solid waste industry. The original Act had not made it clear whether the State-wide legislation would preempt local solid waste control ordinances, and municipalities continued to pass and enforce them. The issue came to a head in *Ringlieb* v. *Parsippany-Troy Hills Tp.*[52] when the owner of a landfill challenged the enforcement of a local solid waste disposal law. The Supreme Court held that the Act was preemptive of local controls. The Legislature thereafter amended the statute to clarify the status of local government authority in this area.[53] These events indicated the necessity for serious consideration and resolution of the preemption question in initial environmental legislation proposals.[54]

The Pesticide Control Act of 1971[55] and the Noise Control Act of 1971[56] with some modifications adhered to the general drafting format found in the solid waste management statute. Administrative rules in both of these areas have been adopted by the DEP.[57] The effectiveness of an environmental program is substantially

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49 *See* So. Ocean Landfill, supra note 44, 64 N.J. at 195-196.

50 N.J. STAT. ANN. 13:1E-7, 13:1E-8 (1975-1976 Supp.).

51 N.J. STAT. ANN. 13:1E-9 (1975-1976 Supp.) provides for penalties of up to $1,000.00 a day and injunctive relief. N.J. STAT. ANN. 13:1E-10 provides an optional administrative procedure designed to correct violations.

52 59 N.J. 348 (1971).

53 N.J. STAT. ANN. 13:1E-17 (1975-1976 Supp.), wherein local ordinances "more stringent" than State provisions were authorized.

54 This issue also arose in the air pollution control area. See State v. Hatco Chemical Co., 96 N.J. Super. 238 (App. Div. 1967); Borough of Verona v. Shalet, 92 N.J. Super. 65 (Law Div. 1966), aff'd. 96 N.J. Super. (App. Div. 1967). The issue of the proper division of authority between State and local government has not been definitively settled, however, the *Environmental Rights Act, infra* note 81, may make the discussion largely academic since it permits local government to directly enforce State environmental statutes and regulations.

55 N.J. STAT. ANN. 13:1F-1 (1975-1976 Supp.) *et seq.*

56 N.J. STAT. ANN. 13:1G-1 (1975-1976 Supp.) *et seq.*

57 N.J.A.C. 7:30-1.1 *et seq.* (pesticides); N.J.A.C. 7:29-1.1 *et seq.* (noise).

dependent on the level of funding it receives. These programs have been supported at low levels of funding and this is unlikely to change in the near future.[58]

(C) Land Use In Areas of Environmental Concern.[59]

Categorical pollution control was a necessary phase in the effort to restore environmental quality. No significant improvements could be realized without fundamental controls of air and water pollution and solid waste disposal. However, by 1970, some inherent limitations in this approach were recognized. As a result of haphazard growth, modest achievements in air and water quality were being seriously undermined. Leapfrog development was consuming large areas of the State's prime agricultural land.[60] Areas of critical environmental concern—wetlands, floodplains and pinelands were threatened by incompatable developments.

Most of the important decisions concerning the future of these areas of State-wide importance were being made at the local level. Some method to share this responsibility with other levels of government had to be implemented to remove the State from the environmental treadmill. The application of traditional land use methods in environmentally sensitive areas was beeing reexamined throughout the country.[61] The "quiet revolution" in land use laws had a distinct impact in New Jersey, and legislation was adopted to promote compatible development in six areas of special environmental concern.[62]

The "critical area" legislation consisted of two principal elements. The first was the delineation of the zone of jurisdiction.

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58 Expenditures for noise control programs in the past several fiscal years have been $95.7 thousand (1973-74), $58.5 thousand (1974-75), $82 thousand (1975-76). For fiscal year 1976-77, although $110 thousand was requested, the proposed budget has no funding recommended for noise control.

59 Goldfein, *Land Use Regulations: Context for Mt. Laurel,* N.J.S.B.J., November, 1975, No. 73, p. 34.

60 The Farmland Assessment Act of 1964, N.J. STAT. ANN. 54:4–23.1 *et seq.* was an attempt to slow down the loss of farmland. *See* Blueprint Report, *supra* note 36.

61 BOSSELMAN & CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL, (1971).

62 The Hackensack Meadowlands Reclamation and Development Act, N.J. STAT. ANN. 13:17–1, *et seq.* (1975-1976 Supp.); The Wetlands Act of 1970, N.J. STAT. ANN. 13:9A–1, *et seq.* (1975-1976 Supp.); The Flood Plains Statute, N.J. STAT. ANN. 58:16A–50, *et seq.*; the Pinelands environmental council, N.J. STAT. ANN. 13:18–1, *et seq.* (1975-1976 Supp.); The Coastal Area Facilities Review Act, N.J. STAT. ANN. 13:19–1, *et seq.* (1975-1976 Supp.); and the Delaware and Raritan Canal State Park Law of 1974, N.J. STAT. ANN. 13:13A–1 *et seq.* (1975-1976 Supp.). These six acts are given the general term, "critical area legislation".

The simplest and normally the most desirable method was to specify legislatively the geographic limits of the area. This was not always practical, but where it was utilized, it minimized uncertainty and the chance of disputes between the affected public and the administrators of the law. The other element involved the scope and implementation of the land use control system. The responsibility of State and local governments had to be defined to prevent the preemption problem which had plagued the Solid Waste Management Act (1970). It was also essential to provide guidance concerning the rationale for decision-making. The New Jersey legislation does not appear to have followed a single model. Rather various techniques were utilized by the draftsmen to implement these requirements.

One of the earliest "critical area" statutes was the Wetlands Act.[63] It was adopted in 1970, just months after the DEP was established. The impetus for its passage came from environmentalists who were alarmed with the rapid rate of development and destruction along the State's coastal marshes.[64] Encouraged by achievements of the movement to protect New England's wetlands, environmentalists used laws passed in Maine and Massachusetts as models for the New Jersey statute.[65]

The Wetlands Act did not specifically delineate the affected area. The Act directed the commissioner of the DEP, in accordance with detailed elevation and vegetative criteria, to map and inventory the wetlands.[66] This task proved to be very difficult and more than $2 million was required to develop the required

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[63] N.J. STAT. ANN. 13:9A–1 (1975-1976 Supp.) *et seq.*

[64] In N.J. Sports & Exposition Authority v. McCrane, 61 N.J. 1 (1972), Justice Hall of the ecological chain has its devastating effect at far distant places and times . . . One of the most important ecological areas in this concern is the so-called 'estuarine zone'—that areas between the sea and the land . . . The Hackensack meadowlands are part of the estuarine zone—about the last of it still largely in its natural state in northeastern New Jersey. Everyone knows that man has abused them almost beyond belief by vast pollution of the water and the dumping of hundreds of acres of garbage." 61 N.J. at 63.

[65] MASS. GEN. LAWS ch. 131, section 40: ME. REV. STAT. ANN. ch. 38, section 472. *See also,* Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E. 2d 666 (Sup. Jud. Ct. 1965); Maine v. Johnson, 265 A.2d 711 (Me. Sup. Jud. Ct. 1970); Just v. Marinette Cty., 56 Wis. 2d 7, 201 N.W. 2d 761 (Sup. Ct. 1972).

[66] N.J. STAT. ANN. 13:9A–2 (1975-1976 Supp.). The statute included in the effected area "any bank, marsh, swamp, meadow, flat or other lowland subject to tidal action . . . including those areas now or formerly connected to tidal waters whose surface is at or below an elevation of 1 foot above local extreme high water . . ."

information.[67] The statute empowered the DEP to adopt regulations to control the alteration of wetlands and required landowners to obtain permits before undertaking any alterations. While there was no express provision for a master plan, the Commissioner was directed to consider the environmental effects of each application for a permit.

An interesting question of a statutory interpretation arose after the Act was approved. Environmentalists contended that marshland destruction was continuing and, in fact, that it was accelerating. They demanded that the DEP impose a moratorium on development or take remedial action on an *ad hoc* basis prior to the completion of the mapping, inventorying and regulation procedures.[68] The department weighed this issue carefully and decided not to intervene. The Appellate Division recently decided a case in which the department's construction of the Act was found to be proper.[69] This situation illustrated the need for those involved in drafting legislation to thoroughly consider and provide for the orderly implementation of the proposals.

The Legislature also indicated special concern for development in the State's flood plains.[70] The control of flooding to reduce damages to person and property was one of the original purposes of local zoning.[71] This objective had been frequently ignored because of competing demands for the use of land. In 1962 the State embarked on a modest program to delineate and mark flood prone areas.[72] The intention was to encourage municipalities to adopt local ordinances consistent with the character of the land.

In 1972 the Legislature decided that the State should take a more active role in flood plain zoning. The DEP was assigned plenary power to adopt environmentally sensitive regulations concerning use and development in delineated floodways. This area was defined as the channel of a natural stream and those portions

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[67] Wetlands orders were adopted. N.J.A.C. 7:7A–1.1 *et seq.* A recent decision involving the permit procedure is In Re Dept. of Environmental Protection, 139 N.J. Super. 514 (App. Div. 1976).

[68] Loveladies Property Owners Assn., Inc. v. Raab, 137 N.J. Super. 179 (App. Div. 1975).

[69] In Sands Point Harbor v. Sullivan, 136 N.J. Super. 436 (App. Div. 1975), the Court rejected plaintiff's contention that the Statute constituted an unconstitutional "taking."

[70] N.J. STAT. ANN. 58:16A–50 *et seq.*

[71] CONST. art. 4, sect. 6, par. 2 and N.J. STAT. ANN. 40:55–32. *See* Cappture Realty Corp. v. Bd. of Adj. of Elmwood Pk., 126 N.J. Super. 200 (Law Div. 1973), aff'd. 133 N.J. Super. 216 (App. Div. 1975), where the efforts of a municipality to deal with land use in flood-prone areas are discussed.

[72] N.J. STAT. ANN. 58:16A–50 to 58:16A–54 (1975-1976 Supp.).

of the flood plain required to carry flood waters.[73] Responsibility for the regulation of other areas of the flood prone lands were divided between the State and local governments. Unfortunately, the delineation process has been costly and time consuming and only a relatively small area is currently subject to effective regulation under this statute.[74]

Critical area legislation to protect New Jersey's coastal area was adopted in 1973.[75] The Coastal Area Facility Review Act (CAFRA) was prompted by a Delaware statute which prohibited new heavy industry from locating on that state's coast.[76] The approach provided in the New Jersey law was to regulate rather than prohibit certain types of major facilities.

The limits of the zone were delineated by a roadway network,[77] and a permit system was established to control development in this area. The Act also required that sophisticated planning techniques be utilized to reconcile protection and development objectives.[78] The department has ruled on a large number of CAFRA permit applications since 1973,[79] and the Appellate Division recently rejected a challenge to the statute brought by an unsuccessful applicant for a permit.[80]

Environmental Rights Act

The last statute to be discussed is not readily assignable to any of the three subdivisions already analyzed. It is entitled the Environmental Rights Act and is commonly referred to as the "citizen's right to sue" law.[81] This is somewhat inaccurate since the Act expressly granted standing to governmental agencies, as well as to any individual to commence an environmental action.[82] For

73 N.J. STAT. ANN. 58:16A–51 to 58:16A–66 (1975-1976 Supp.).

74 Approximately 25% of the State's flood plain areas have been delineated.

75 N.J. STAT. ANN. 13:19–1 (1975-1976 Supp.) *et seq.*

76 Delaware Coastal Zone Act, Del. C. § 7001 *et seq.*

77 N.J. STAT. ANN. 13:9–4 (1975-1976 Supp.).

78 N.J. STAT. ANN. 13:19–16 (1975-1976 Supp.).

79 The department has received 155 permit applications; 86 permits have been issued, 6 applications have been denied, 46 were pending in early March, 1976, and 17 were canceled.

80 Toms River Affiliates v. New Jersey Department of Environmental Protection, 140 N.J. Super. 135 (App. Div. 1976).

81 N.J. STAT. ANN. 2A:35A–1 (1975-1976 Supp.) *et seq.* For a discussion of the New Jersey law, *see* Goldshore, *A Thumbnail Sketch of the Environmental Rights Act,* N.J.B.J. Winter, 1975, 18.

82 *See* N.J. STAT. ANN. 2A:35A–3a broadly defines the term "person" to include ". . . the State, any political subdivision of the State and any agency or instrumentality of the State or any political subdivision of the State."

more than four years the New Jersey Legislautre considered the concept of expanded rights of standing to bring environmental lawsuits. The bill's importance was distorted in the legislative process and it became a symbol of power between those in favor of environmental legislation and those opposed.

The Environmental Rights Act combines the elements of statutes adopted in Massachusetts and Michigan and enables any person to bring suit to enforce an existing environmental statute, regulation or ordinance.[83] In those instances where the allegedly offensive conduct is not so proscribed, the Act creates what can be characterized as a general substantive right to protect the environment.[84] The full impact of the statute must await judicial interpretation. Interestingly, the fear that the adoption of the Environmental Rights Act would result in a flood of litigation was unjustified. There have been very few actions brought pursuant to its provisions.[85]

Conclusion

Since colonial days, the New Jersey government has expressed its concern over environmental protection by enacting legislation aimed directly at remedying environmental abuses. This concern was spurred by strong public opinion in the last decade, the result being a flurry of environmental legislation. From 1970 through 1975, the State Legislature adopted a comprehensive program in an attempt to balance ever-growing urban and industrial interests with protection for the environment.

Various methods were used to strike this balance. The State Legislature restructured certain government agencies to streamline operations and to reallocate duties among local and state

83 For a discussion of the Michigan statute, *see* Sax & DiMento, *Environmental Citizens Suits: Three Years Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974). The Massachusetts law is reviewed in McGregor, *Private Enforcement of Environmental Law: An Analysis of the Massachusetts Citizen Suit Statute*, 1 ENVIRONTMENTAL AFFAIRS 606 (1971).

84 N.J. STAT. ANN. 2A:35A–46 and 2A:35A–7a when read together establish a substantive right to protect the environment. In two unreported cases, the New Jersty courts indicated a willingness to accept this interpretation. Fenske v. Morris Co. Mosq. Ext. Comm., Docket No. C-4453-73; Finch, Van Ness v. 195 Boardway Corp., Docket No. L-32749-75 Cf. Michigan v. Vanderkloot, 220 N.W. 2d. 416 (Mich. Sup. Ct. 1974).

85 The chief obstacle to citizen actions appears to have been financing the costs of litigation. Many environmental cases require costly expert testimony and laboratory analysis. In Michigan, the average cost of a trial in a case brought pursuant to the citizens-suit statute was $10,000. *See* Sax & DiMento, *supra* note 83 at 51.

entities. Tax laws were reexamined to provide incentives for control of pollution. Legislation was directed at control of specific categories, such as air pollution, water pollution, and solid waste disposal. Other laws were prompted by concern over misuse of "critical areas" such as wetlands, floodplains and pinelands. Finally, legislation was passed to expand the rights of citizens in bringing environmental lawsuits.

It will be essential for the executive and legislative branches of government to be equally innovative and willing to experiment with new approaches as new challenges arise in the coming years.