



# State of New Jersey

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

OFFICE OF THE COMMISSIONER

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**PHILIP D. MURPHY**

*Governor*

**SHAWN M. LATOURETTE**

*Commissioner*

**SHEILA Y. OLIVER**

*Lt. Governor*

### ADMINISTRATIVE ORDER NO. 2023-08

WHEREAS, the conservation, restoration, and protection of natural resources promote the health, safety, and welfare of the State's residents, support community and economic development, and especially benefit the tourism, recreation, and other businesses and industries dependent upon clean water, beaches, and other natural resources vital to the State's economy; and

WHEREAS, the State holds all natural resources in trust for the benefit of the people, including, all land, vegetation, biota, fish, shellfish, wildlife and the habitats of each, all waters, including the ocean and its estuaries to the seaward limit of the State's jurisdiction, and all springs, streams and bodies of surface or groundwater, whether natural or artificial, within the boundaries of the State, the air, and all other such resources owned, managed, controlled, entrusted or otherwise under the jurisdiction of the State; and

WHEREAS, the State's Commissioner of Environmental Protection serves as the Trustee of all natural resources of the State with a possessory interest to protect the same, and a fiduciary duty to the people of New Jersey to ensure that natural resource injuries are assessed, that injured natural resources are restored, and that the public is compensated for their injuries; and

WHEREAS, certain natural resources are also held in trust by the federal government for the benefit of all people of the United States; for these resources, the Commissioner may serve as a co-trustee together with federal trustees, which may include the U.S. Department of Interior, the National Oceanic and Atmospheric Administration, or the U.S. Department of Defense; and

WHEREAS, natural resources can become injured or altered by a variety of means, including through the discharge of hazardous substances, contaminants, or other pollutants to the environment; and

WHEREAS, parties in any way responsible for a discharge of hazardous substances, contaminants, or other pollutants to the environment, or who otherwise injure natural resources of the State ("responsible parties"), are required to remediate discharges; however, remedial actions serve a discrete purpose and may not fully restore injured natural resources; and

WHEREAS, because remedial actions fail to fully restore injured or altered natural resources to their condition prior to the discharge of hazardous substances, contaminants, or other pollutants ("pre-discharge condition"), responsible parties are liable to the people for natural resource restoration; and

WHEREAS, the natural resource restoration policy of the State is twofold, including a requirement that injured natural resources be returned to the same quality, quantity, function, and value that existed prior to the injury (known as “primary restoration”), and a requirement that the people be compensated for the period of time that natural resources remained injured (known as “compensatory restoration”); and

WHEREAS, primary and compensatory natural resource restoration determinations are vested in the discretion of the Commissioner as Trustee, the obligations for which are separate from and in addition to requirements established by the Department of Environmental Protection (Department) that govern a responsible party’s obligation to investigate and remediate the discharge of hazardous substances, contaminants, or other pollutants; and

WHEREAS, remediation requires investigation and cleanup to address risks to human health, safety, and the environment pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, and the Remediation Standards, N.J.A.C. 7:26D, whereas the Trustee’s fiduciary duty to the public, as executed through the aforementioned natural resource restoration policy, requires the Commissioner to ensure the restoration of injured natural resources through primary and compensatory restoration; and

WHEREAS, to fulfill the fiduciary obligation to ensure the restoration of injured natural resources, the Commissioner, through the instrumentalities of the Department, is empowered to direct, procure, and administer natural resource restoration activities, including, but not limited to, the administrative or judicial pursuit of restoration commitments, monetary damages in lieu of or in addition to restoration, costs of natural resource injury assessment, and legal fees and costs, from responsible parties; and

WHEREAS, the Department must carefully balance its obligation to ensure the restoration of injured natural resources with its responsibility to judiciously deploy the finite resources of the Department in such pursuits, which together demands that the Department explore opportunities that enable the expeditious restoration of the greatest quantity and quality of natural resources that, in the Trustee’s sole judgement, best compensate the public for an injury; and

WHEREAS, the Department may elect to pursue, and has pursued, natural resource injury assessment and restoration through a voluntary collaborative settlement process with responsible parties (“collaborative process”) while reserving all rights to pursue legal action where necessary and appropriate in the Commissioner’s discretion and in consultation with the Attorney General; and

WHEREAS, subject to the Commissioner’s direction and approval, the Department’s Office of Natural Resource Restoration (ONRR) assesses natural resource injuries and identifies, plans, and directs or administers projects intended to restore, enhance, or further protect natural resources (“restoration projects”); and

WHEREAS, through its natural resource restoration program, the Department has restored, conserved, enhanced, and protected thousands of acres of wetlands, fish and wildlife habitat, groundwater aquifer recharge areas, and public open space; and



WHEREAS, the Department also has procured hundreds of millions of dollars in monetary recoveries from responsible parties through both collaborative processes and legal actions, which recoveries have supported significant restoration projects that enhance natural resource quantity and quality, including critical improvements to and protections for surface and groundwater resources; and, in many cases, restoration projects also provide co-benefits to the public, such as increased flood protection and climate resilience, greater public access to green, open space and natural resources, improved natural resource stewardship and research, and reductions in the amount or degree of disproportionate environmental and public health stressors within overburdened and underserved communities; and

WHEREAS, the Department prioritizes its investment of a monetary recoveries in the immediate area where subject natural resources were injured, or within the water region where the subject injuries occurred, pursuant to N.J. Const. art. VIII, § 2, ¶ 9 (NRD Constitutional Amendment), effective December 7, 2017; and

WHEREAS, to fulfill the Commissioner's public trust and fiduciary responsibilities, the Department should ensure that responsible parties, in the course of remediating discharges of hazardous substances, contaminants, or other pollutants, meet their obligation to assess and restore injured natural resources, including injuries that may not be fully restored through the selected remedial action(s), and that responsible parties receive notice of their ability to voluntarily and permanently resolve their natural resources damage (NRD) liabilities through a collaborative process with the Department; and

WHEREAS, the Department's pursuit of natural resource injury assessment and restoration through the voluntary collaborative process with responsible parties to resolve potential NRD liabilities, in conjunction with ongoing remediation or otherwise, has increased and is likely to continue increasing natural resource restoration projects, providing more immediate and direct compensation to the public, and avoiding the delay, uncertainty, and expense of litigating NRD claims before the courts; and

WHEREAS, the Department's policies and procedures for voluntarily resolving potential NRD liabilities with responsible parties would benefit from improvements that increase transparency and maximize responsible party participation; and

WHEREAS, responsible parties should consider natural resource injury assessment and restoration coincident with their response to a discharge of hazardous substances, contaminants, or other pollutants, and the Department should encourage responsible parties to assess and voluntarily resolve their NRD liabilities in the course of performing their contaminated site remediation obligations; and

WHEREAS, because the collaborative process of resolving NRD liabilities may fail or may not be appropriate under certain circumstances as determined by the Commissioner in his or her sole discretion as Trustee, at all times and in all cases, the Department reserves every available right to pursue unilateral assessment, restoration, or legal actions where it deems necessary or appropriate, in consultation with the Attorney General, and without advanced notice to responsible parties; and



WHEREAS, in service of the public whose natural resources the State holds in trust, it is appropriate, in the Trustee's discretion, for the Department to engage directly with members of the public concerning natural resource injuries that affect their communities, and to routinely seek input from affected communities, stakeholders, and the public concerning the identification, planning, and implementation of restoration projects;

NOW, THEREFORE, I, Shawn M. LaTourette, Commissioner of Environmental Protection, pursuant to the authority vested in me by N.J.S.A. 13:1B-3 and N.J.S.A. 13:1D-9, and in due consideration of the authorities, obligations, and requirements of the State's environmental laws, including but not limited to, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11a et seq., Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the common law public trust and *parens patriae* doctrines, hereby make the following findings and issue the following directives to all Department personnel:

### **Natural Resource Restoration Policy**

1. It is the policy of the Department, in discharging the Commissioner's duty as Trustee of the public's natural resources, to pursue the assessment and restoration of injured or altered natural resources, including those injured by any past, present, or future discharge of hazardous substances, contaminants, or other pollutants reported to or otherwise discovered by the Department.
2. To properly discharge the Commissioner's fiduciary duty to the public, the Department should exercise discretion in the implementation and enforcement of this policy given that the scope and scale of natural resource injuries may vary significantly depending on, *inter alia*, the type, timing, location, nature, and extent of the injuries, as well as the feasibility of restoration goals and means as determined by the Department.
3. To implement this policy, the Department should, where in its discretion it deems appropriate, pursue the assessment and restoration of injured natural resources through a collaborative process with responsible parties for the express and limited purpose of amicably resolving their potential NRD liabilities. The goal of the collaborative process is to promote a fair compromise that expedites the resolution of NRD liabilities and restoration of injured natural resources.
4. Where the Department, in its discretion, reaches amicable resolutions of NRD liabilities with responsible parties, it is anticipated that such settlements would reflect a discounted NRD valuation as a matter of compromise and in recognition of a responsible party's cooperation, and the benefit to the public of avoiding litigation, related costs, uncertainty, and potential further delay in achieving restoration of injured natural resources.
5. At all times and in all cases, the Department reserves every available right to pursue unilateral assessment, restoration, or administrative or judicial actions where necessary or appropriate in the Department's judgement, in consultation with the Attorney General, irrespective of any past or present collaborative process, and without advanced notice to any responsible party.



## **Collaborative Process for Natural Resource Injury Assessment and Restoration**

6. To facilitate implementation of this policy, relevant Department programs and offices are hereby directed to undertake the following actions under the further direction of the Chief Advisor, Office of Legal and Regulatory Affairs, and subject to the ultimate approval of the Commissioner:
  - a. ONRR and Contaminated Site Remediation and Redevelopment (CSRR) should establish protocols and procedures that encourage responsible parties to assess and endeavor to resolve potential NRD liabilities through a collaborative process. Such protocols may include, but shall not be limited to, the identification of information necessary to initiate the collaborative process, guidelines for submittal of information to the Department, and the development of relevant forms to facilitate information sharing, which may include new or amended site remediation forms commonly submitted to the Department by responsible parties and licensed site remediation professionals (LSRPs). Any protocols or procedures developed pursuant to this direction are intended only to guide a potential collaborative process; and
  - b. ONRR should develop technical assistance to support the collaborative process and facilitate the assessment of natural resource injuries by responsible parties exploring the voluntary resolution of potential NRD liabilities, which technical assistance responsible parties may, but are not required, to utilize. The Department's provision of technical assistance, which may include the identification of accepted means and methods of natural resource injury assessment, shall be in the Department's sole discretion, intended for the express and limited purpose of informing a collaborative process, and in no way limits the use of other accepted means and methods of assessing natural resource injuries in any administrative or judicial forum.
  - c. Notwithstanding the further establishment of protocols and procedures as specified in paragraphs 6(a)-(b), the Department may determine to enter into a collaborative process with any responsible party that provides the following information to ONRR in a form and of a quality acceptable to the Department:
    - i. A written statement of interest in exploring the voluntary resolution of potential NRD liabilities, which shall identify the subject site and describe the circumstances giving rise to potential NRD liability, and certify that the site is not the subject of any unresolved administrative or judicial action by the Department;
    - ii. A summary of the operational history of the subject site and all relevant information that describes the storage, use, and discharge of any hazardous substances, contaminants, or other pollutants giving rise to potential NRD liability;
    - iii. A description of the pre-discharge conditions at the site, which shall articulate the basis for the determination of such conditions;



- iv. A delineation of the nature, extent, and duration of the subject contamination exceeding pre-discharge conditions, and information pertinent to the assessment of injuries to natural resources, which may be readily available based on activities conducted in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, particularly, N.J.A.C. 7:26E-4, or other reasoned analysis, including modeling consistent with accepted means and methods of natural resource injury assessment;
- v. A description of the environmental features and media at and in the immediate vicinity of the site;
- vi. A proposal to resolve the responsible party's primary and compensatory restoration obligations, which shall reflect the responsible party's assessment of natural resource injuries in accordance with commonly accepted means and methods of determining NRD liabilities, and include performance-based proposals for specified restoration projects, proposals for monetary resolution(s), or a combination thereof; and,
- vii. Where a responsible party proposes a monetary resolution of its NRD liabilities, the responsible party may, but is not required to, suggest candidate restoration projects that the Department may consider funding pursuant to the NRD Constitutional Amendment, the selection or performance of which shall be in the Trustee's sole discretion.

### **Natural Resource Restoration Advisory Council**

- 7. It is the policy of the Department to engage directly with the public whose natural resources the State holds in trust concerning the Department's identification, selection, planning, and implementation of restoration projects, and to provide information and seek input on restoration projects from communities affected by the relevant discharge(s) of hazardous substances, contaminants, or other pollutants.
- 8. To aid the Department in such engagement, there is hereby created, within the Department, the Natural Resource Restoration Advisory Council (NRRAC), which is convened by the Commissioner for the limited and express purpose of providing insight and feedback concerning the Department's identification, planning, and implementation of restoration projects, and to assist the Department in communicating restoration project objectives and outcomes to the public.
- 9. The NRRAC shall:
  - a. Consist of two permanent members employed by the Department:
    - i. The Department's Assistant Commissioner for Community Investment and Economic Revitalization (CIER), who maintains direct oversight of ONRR and other programs dedicated to strengthening investments in natural,





historic, and cultural resources, shall serve as the Commissioner's designee to and Chair of NRRAC; and,

- ii. One representative of ONRR appointed by the Chair.
- b. Consist of one member from each of the following sectors or organizations, appointed by the Commissioner, each of whom shall serve a two-year term:
- i. A representative of a statewide organization dedicated to the conservation, restoration or preservation of land or other natural resources;
  - ii. A representative of a statewide environmental justice organization;
  - iii. A representative of a regulated entity routinely engaged in the remediation or restoration of injured natural resources, or a business or trade organization representative of such regulated entities;
  - iv. A representative of an academic institution or research organization whose work is dedicated, at least in part, to the study or improvement of natural resources; and,
  - v. A representative of a local government unit whose work is dedicated, at least in part, to environmental concerns or stewardship of public lands or resources, or an organization representative of such local government units.
- c. Consist of two public members appointed by the Commissioner, each of whom shall serve a two-year term.
- d. Perform the following primary advisory functions, and such other related advisory functions as may be later identified by the Chair, in order to support and promote the goals of the Trustee:
- i. Develop and present recommendations for establishing a publicly accessible and interactive mechanism through which the Department would identify and catalogue potential restoration project opportunities;
  - ii. Develop and present recommended principles and priorities that could be considered by the Department in the process of identifying, planning, and implementing restoration projects;
  - iii. Produce an annual report to the Commissioner that identifies potential restoration project opportunities statewide, a draft of which the Chair may determine to be an appropriate subject for a public engagement session conducted by the NRRAC; and,



- iv. Provide recommendations to the Department to inform and support public engagement and communications concerning pending or proposed restoration projects.
  - e. Convene all members of NRRAC no less than once each quarter of every calendar year to conduct NRRAC business, the exact meeting frequency, location, and agenda to be determined by the Chair in consultation with NRRAC members.
- 10. Through acts of the Chair, the NRRAC may, where appropriate to support the objectives of the Trustee and this Order, call upon the expertise of Department personnel, through whom the NRRAC may also confer with representatives of trustees of federally held natural resources where pending or potential restoration projects involve multiple trustees.
- 11. Each member of the NRRAC shall serve at the pleasure of the Commissioner, may be excused by the Commissioner with or without cause, and shall not be compensated by the Department or the State for their service on NRRAC, unless such service is attendant to their preexisting State employment.
- 12. All work and recommendations of the NRRAC shall be strictly advisory in nature. At all times and in all cases, the selection of restoration projects, including, but not limited to, the investment of any monetary recoveries from the litigation or settlement NRD liabilities, shall remain in the sole discretion of the Commissioner as Trustee, which discretion shall be applied pursuant to the NRD Constitutional Amendment.
- 13. The role, work, and recommendations of the NRRAC shall be limited to the Department's identification, planning, and implementation of restoration projects, and the NRRAC shall not engage in any collaborative process with or be privy to any settlement discussions between the Department and any responsible parties, but the NRRAC may advise the Department in implementing restoration projects once a settlement is achieved.

## **Public Information**

- 14. To enhance the public availability of information pertaining to the identification, planning, and implementation of restoration projects, ONRR shall take the following actions consistent with this Order:
  - a. Develop and maintain for public viewing on the Department website, an interactive dashboard that identifies each restoration project administered by the Department as of the date of this Order, its status, funding source, and any other information relevant to the directives herein;
  - b. Develop and maintain for public viewing on the Department website, a repository of potential natural resource restoration projects in each water region of the state; and,
  - c. Maintain for public viewing on the Department website, an archive of past NRD recoveries and natural resource restoration projects.

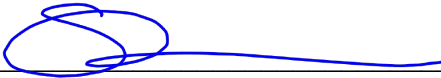




## Additional Provisions

15. Notwithstanding the availability of the collaborative process described herein, at all times and in all cases, the Department reserves every available right to pursue unilateral action, including, but not limited to, directives, orders, assessment, restoration, or administrative or judicial actions where appropriate in the Department's judgement, in consultation with the Attorney General, irrespective of any past or present collaborative process, and without advance notice to any responsible party.
16. The issuance of this Order and the provisions and directives herein are intended to be prospective in nature and are not intended to have any bearing or effect upon any ongoing collaborative process, settlement discussions, or administrative or legal action concerning alleged injuries to natural resources of the State and shall not be construed to limit the timing or scope of any future administrative or judicial action brought by the Department.
17. Neither the Department's nor any responsible party's assessment of natural resource injuries in any collaborative process, including any monetary valuation of potential NRD liabilities therein, shall be construed to have any precedential, evidentiary, preclusive, or legally binding effect in any other administrative or judicial action, including, but not limited to, pending or future litigation alleging injuries to the natural resources of the State.
18. Nothing in this Order is intended to create a private right of action to enforce any provision set forth herein nor is it intended to diminish any existing legal rights or remedies of the Department or any third-party.
19. Nothing in this Order shall be construed to supersede any federal, State, or local law; create a private right of action on behalf of any person or entity; diminish any existing legal rights or remedies available to the Department or any other person or entity; confer any legal rights upon persons or entities whose activities are regulated by the Department; or serve the basis for legal challenges to rules, approvals, permits, licenses, policies or other actions or inaction by the Department or any other state entity,
20. This Order shall take effect immediately and shall continue until revoked or otherwise amended in writing by the Commissioner. Any previous administrative orders, policy directives, or portions thereof, including portions of Policy Directive 2003-07 signed on September 24, 2003, that are inconsistent with this Order are hereby superseded and repealed.

Dated: March 14, 2023

  
Shawn M. LaTourette  
Commissioner

