NEW JERSEY
CIVIL JUSTICE
INSTITUTE

MEMORANDUM

TO: Senate Environment and Energy Committee
FROM: Alex Daniel, Counsel
SUBJECT: Senate Concurrent Resolution 43
DATE: March 13, 2024

The New Jersey Civil Justice Institute ("NJCJI") provides this memorandum to express its concerns to the Senate Environment and Energy Committee ("Committee") regarding Senate Concurrent Resolution 43 ("SCR43"). By way of background, NJCJI is a nonprofit, nonpartisan coalition of New Jersey's largest employers, trade associations, and professional organizations. NJCJI advocates for a fair, predictable, and efficient civil justice system in New Jersey, which is an essential ingredient for continued capital investment, innovation, and job creation in the state.

Although seemingly well intentioned, SCR43 threatens to supplant the Legislature and Executive branches as the primary makers of environmental policy in our State, and place private litigants and the judiciary in charge of enforcing the nebulous right to "a clean and healthy environment" and the "preservation of the . . . environment." In so doing, SCR43 would upend our current regulatory regime, with its built-in protections and careful, deliberative processes, and replace it with a system by which environmental policy is decided by litigants and judges. The careful balancing of environmental, economic, and human concerns that our current regulatory system provides would give way to regulation by litigation, which would necessarily exclude important stakeholders from the rulemaking process and put judges in charge of developing environmental policies. This outcome would not only sew chaos into our State's well-established and stable regulatory system, but also inject new litigation into our civil justice system. Although judges are and jurors are excellent arbiters of law and fact, respectively, they are not and should not become environmental "super policymakers" with the power to second guess our elected leaders. As such, NJCJI respectfully opposes SCR43.

By way of background, our Legislature has developed a thoughtful, deliberative system for regulating environmental concerns in this State. Specifically, the Legislature has empowered the New Jersey Department of Environmental Protection ("DEP") to "formulate comprehensive policies for the conservation of natural resources in the State [and] the promotion of environmental protection." In re Adoption of N.J.A.C. 7:15-5.24(b), 420 N.J. Super. 552, 558 (App. Div. 2011); see generally N.J.S.A. 13:1D-1 to -137 (DEP enabling statute). Indeed, in a host of areas, including water and air quality management and the protection of our natural resources, the DEP has the authority to "adopt rules and regulations to effectuate objectives" delineated by the Legislature. See id. at 559. "[T]he promulgation of administrative rules and regulations lies at the very heart of the administrative process," which our Legislature has developed for the purpose of "permitting 'expert and flexible control in areas where the diversity of circumstances and situations to be encountered forbids the enactments of legislation anticipating every possible problem which may arise and providing for its solution.'" In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J.

Super. 100, 115 (App. Div. 2013) (quoting Cammarata v. Essex Co. Park Comm., 26 N.J. 404, 410 (1958)). Said differently, "[t]he basic purpose of establishing agencies to consider and promulgate rules is to delegate the primary authority of implementing policy in a specialized area to governmental bodies with the staff, resources and expertise to understand and solve those specialized problems." Ibid (internal quotation marks and citation omitted).

In addition to vesting experts in executive agencies with the authority to create regulations, our Legislature requires that the DEP adopt those rules in accordance with the Administrative Procedures Act ("APA"), N.J.S.A. 52:14B-1 to -25. In re Amendments and New Regulations at N.JA.C. 7:27-27.1, 392 N.J. Super. 117, 138 (App. Div. 2007). The formal rulemaking process set forth in the APA, "allows [DEP] to further policy goals of legislation by developing coherent and rational codes of conduct so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance." In re 7:1B-1.1 Et Seq., 431 N.J. Super. at 134. Moreover, "[t]he procedural requirements for the passage of rules are related to the underlying need for general fairness and decisional soundness that should surround the ultimate agency determination." Ibid. (internal quotation marks and citation omitted). The validity of any agency determination requires "compliance with the specific procedures of the APA that control promulgation of rules." Ibid. Moreover, the procedures required by the APA include strict public notice periods, comment periods, and review periods, and require agencies to give relevant stakeholders an opportunity to weigh in on the appropriateness and impacts of environmental regulations.

To be certain, our courts do have a clear yet narrowly defined role in the rulemaking process. Parties may challenge the validity of regulations before our courts, with the limitation that courts must accord those regulations "a presumption of validity and reasonableness." Id. at 114. Indeed, "[t]his deference [by our courts] comes from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." Id. at 115. As such, our courts understand that their function is not "to assess the wisdom of [an] agency's decision, but only its legality." Ibid. In that vein, a court "may not substitute its judgment for the expertise of an agency 'so long as that action is statutorily authorized and not otherwise defective because [it is] arbitrary or unreasonable.'" Id. at 116 (quoting Williams v. Dep't of Human Servs. 116 N.J. 102, 107 (1989)). Said differently, our courts understand that they are not technical experts in the same sense as agency staff and other traditional policymakers, and are therefore limited to determining solely if agencies complied with their enabling statutes, the APA, and constitutional norms "in deciding whether a particular agency action is authorized." Ibid.

Here, SCR43 threatens to upend this carefully calibrated regulatory process by injecting litigants and courts into the policymaking process and permitting them to second guess the expert determinations of our Legislature and DEP. Specifically, SCR43 provides that:

> (a) Every person has a right to a clean and healthy environment, including pure water, clean air, and ecologically heathy habitats, and to the preservation of the natural, scenic, historic, and esthetic qualities of the environment. **The State shall not infringe upon these rights, by action or inaction.**
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> (b) The State's public natural resources, among them its waters, air, flora, fauna, climate, and public lands, are the common property of all people, including both present and future generations. The State shall serve as trustee of these resources, and shall conserve and maintain them for the benefit of all people.
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> (c) This paragraph and the rights stated herein are (1) **self-executing**, and (2) shall be in addition to any rights conferred by the pubic trust doctrine or common law."

[See SCR43 (emphasis added).]

Here, SCR43 is problematic for a host of reasons. First, the rights conferred by SCR43 are vague and ill defined. For instance, SCR43 does not define what is meant by "a clean and healthy environment," or the scope of the State's responsibility to preserve "the natural, scenic, historic and esthetic qualities of the environment." Similarly, SCR43 fails to explain to what end the State "shall conserve and maintain" public natural resources "for the benefit of all people," including "both present and future generations." Given SCR43's vagueness and lack of clear definitions, an interminable number of meanings can be read into the proposed amendment's terms, threatening to inject uncertainty in our civil justice system as parties jockey to parse meaning from its language.

Second, given that SCR43 is "self-executing," litigants will be free to use SCR43 as a cudgel to reform and reshape our State's environmental policies to suit their needs, wants, and desires. Indeed, through private litigation, individuals will be able to sue to State any time it allegedly "infringe[s] upon" SCR43's vaguely defined rights "by action or inaction." Specifically, the New Jersey Civil Rights Act ("NJCRA"), N.J.S.A. 10:6-1 to -2, permits individuals to assert a private cause of action against any person or entity "acting under color of law," for violations of, or interference or attempted interference with, "any substantive rights, privileges or immunities secured by the Constitution or laws of this State." Perez v. Zagami, LLC, 218 N.J. 202, 207 (2014). Moreover, "[i]n addition to any damages, civil penalty, injunction or other appropriate reliefs in an action . . . the court may award the prevailing party [in a NJCRA action] reasonable attorney's fees and costs." Empower Our Neighborhoods v. Guadagno, 453 N.J. Super. 565, 580 (App. Div. 2018). "Plaintiffs can recover counsel fees under our fee-shifting statute even if the lawsuit achieves the desired results because it brought about a voluntary change in the defendant's conduct." Ibid.

Here, SCR43 is ripe for abuse as parties may file NJCRA claims on the basis of their rights under the proposed amendment to force the State and its agencies to regulate human activities in the name of a "clean and healthy environment." Indeed, given the fee-shifting provisions in the NJCRA, litigants and their attorneys have every motivation to bring such claims. For example, SCR43 opens the door to litigants affirmatively challenging new regulations and standards promulgated by DEP on the basis that those rules are not adequately protective of "a clean and healthy environment" or sufficient for "the preservation of the natural, scenic, historic and esthetic qualities of the environment." In turn and in direct contradiction of our current regulatory system, our courts would then be required "to assess the wisdom of the agency's decision," and "substitute its judgment for the expertise of" DEP. In re 7:1B-1.1 Et Seq., 431 N.J. Super. at 114. As a result, SCR43 threatens to turn litigants and courts into the "primary authority [for] implementing policy in a specialized area," to the detriment of "governmental bodies with the staff, resources and expertise to understand and solve those specialized problems." Id. at 115. SCR43 will empower litigants and our courts to act as "super policymakers" that sit above the Legislature and State agencies, and have the power to both second guess our elected official's studied policy determination.

In addition to permitting private parties to directly challenge the merits of DEP regulations, litigants may use SCR43 to force the State to affirmatively regulate human activities that conflict with their amorphous right to a clean environment. Indeed, SCR43 provides that "[t]he State shall not infringe upon" New Jersey residents' new environmental rights through either "action or **inaction**." See SCR43 (a) (emphasis added). As such, even after studied deliberation and policymaking, if the Legislature and DEP elect not to act concerning certain human activities, litigants may assert NJCRA claims against that State on the basis that its inaction harmed litigants' rights under SCR43. Given the availability of injunctive relief under the NJCRA and the lack of

guardrails within SCR43, courts would have the authority to order the State to pass regulations, thus supplanting the Legislature and executive agencies' policymaking with its own. Troubling, even in the event that a court orders the Legislature and executive agencies to pass new environmental policies, nothing would prevent another individual from filing yet another NJCRA claim challenging those new rules as violative of their environmental rights. In essence, SCR43 may create a death spiral of litigation where aggrieved litigants continuously challenge every act or failure to act by government. Given the powerful incentives for litigation presented by fee-shifting under the NJCRA, SCR43 may cause an explosion of environmental litigation in our courts, resulting in undue stress on our civil justice system.

The threat posed by SCR43 is not limited to interference with our Legislature and State agencies' environmental policymaking. Any action taken by the State, its agencies, local governments, or any entity operating "under color of law" may be subject to an NJCRA suit pursuant to SCR43 to the extent that such action touches upon some environmental concern. For instance, a current major priority of our State has been encouraging the development of offshore wind power to meet our energy needs in a sustainable and environmentally sound fashion. Despite the importance of these efforts, SCR43 could provide a powerful means for even a single aggrieved litigant to challenge offshore wind facilities so long as that litigant can assert those projects harm their environmental rights. Similarly, our State is on track to adopt electric vehicles as the future of transportation in New Jersey. Yet, under the guise of enforcing their environmental rights under SCR43, individuals could challenge important clean energy and transport projects if they can demonstrate any capacity for interfering with a "clean and healthy environment." For example, lithium mining, processing, and refining activities abroad, which by their nature do produce pollutants and greenhouse gases that have a global impact, could be cited by litigants challenging our State's electric vehicle mandates. Even local government action may be impacted. Despite local governments, planning boards and zoning authorities acting in concert with citizens, businesses, stakeholders, and developers to approve local projects, such as affordable housing, SCR43 offers aggrieved litigants, property owners or objectors a new tool for challenging municipal land use actions. Ultimately, the opportunities for litigation abuse posed by SCR43 cautions against its adoption.

Here, despite its good intentions, SCR43 threatens to upend our State's regulatory system while simultaneously placing undue strain on the civil justice system. Given its vague and ill-defined terms, parties will no doubt jockey to read expansive meaning into its text for the purpose of advancing their specific agenda. Moreover, by filing suits against the State and state actors, litigants can turn SCR43 into a device for promoting regulation via litigation, supplanting our elected officials' and State agencies' wisdom for that of our judiciary. The impact that has on our State will not be limited to our Legislature and agencies' environmental rulemaking—any action by a state actor that touches upon the environment may be subject to a private cause of action seeking redress of SCR43 environmental rights. Given these concerns, NJCJI respectfully opposes SCR43.