

## NJDEP's Groundbreaking Environmental Justice Regulations Published for Public Comment

By **Richard F. Ricci**, **Allison Gabala**, **Mark S. Heinzelmann**, and **Zachary L. Berliner**

### Introduction

On June 6, 2022, the New Jersey Department of Environmental Protection (NJDEP or Department) published its long-anticipated Environmental Justice **rule proposal**<sup>1</sup> (EJ Rule Proposal)<sup>2</sup>—the nation's first proposed environmental justice<sup>3</sup> regulations that require a state agency to evaluate and address environmental and public health impacts when facilities in “overburdened communities”<sup>4</sup> seek certain permits from NJDEP. The EJ Rule Proposal, the regulations that resulted from New Jersey's pioneering **Environmental Justice Law**<sup>5</sup> (EJ Law) enacted in September 2020, was issued following months of stakeholder meetings that NJDEP held across the state in partnership with local governments, community groups, and the regulated community to discuss and solicit public input on several aspects of the proposed regulations. The EJ Rule Proposal now goes into a 90-day public comment period, where it will surely face intense scrutiny from the regulated community and other interested parties.

### Overview of the EJ Rule Proposal

The EJ Rule Proposal contains the full text of the proposed regulations to implement the EJ Law, preceded by a detailed discussion of NJDEP's policy perspectives and the regulations' various provisions. A summary of the regulations follows:

- **Applicability:** The proposed regulations apply when an applicant:
  - (1) Seeks either:
    1. A “permit”<sup>6</sup> for any “facility”<sup>7</sup> that is “new”<sup>8</sup> or “expanding”<sup>9</sup>; or
    2. A “major source permit” for any facility, as defined at N.J.A.C. 7:27-22.1;
  - **AND** (2) the facility is or will be in an overburdened community (which, on top of the EJ Law definition, would include zero-population areas directly adjacent to overburdened communities).<sup>10</sup>

<sup>1</sup> 54 N.J.R. 971(a).

<sup>2</sup> Proposed to be codified in the New Jersey Administrative Code in a new “Chapter 1C” (N.J.A.C. 7:1C-1.1 to -10.3).

<sup>3</sup> The U.S. Environmental Protection Agency defines “environmental justice” as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” <https://www.epa.gov/environmentaljustice>.

<sup>4</sup> The EJ Law defines “overburdened communities” as any census block group in which, under the most recent United States Census: (i) at least 35% of households are low income; (ii) at least 40% of residents identify as minority or as members of a state recognized tribal community; or (iii) at least 40% of households have limited English proficiency. N.J.S.A. 13:1D-158.

<sup>5</sup> N.J.S.A. 13:1D-157 et seq.

<sup>6</sup> “Permit” is defined as any individual permit, registration, or license issued by the NJDEP to a facility pursuant to a number of state laws, including the Waterfront and Harbor Facilities Act, the Solid Waste Management Act, the Comprehensive Regulated Medical Waste Management Act, the N.J. Statewide Mandatory Source Separation and Recycling Act, the Pesticide Control Act, the Wetlands Act of 1970, the Freshwater Wetlands Protection Act, the Coastal Area Facility Review Act, the Highlands Water Protection and Planning Act, the Air Pollution Control Act, the Water Supply Management Act, the Water Pollution Control Act, and the Flood Hazard Area Control Act, except that “permit” shall not include “any authorization or approval necessary to perform a remediation . . . or any authorization or approval required for a minor modification of a facility's major source permit for activities or improvements that do not increase actual or potential emissions.” Proposed N.J.A.C. 7:1C-1.5.

<sup>7</sup> “Facility” is defined as any (1) major source of air pollution; (2) resource recovery facility or incinerator; (3) sludge processing facility, combustor or incinerator; (4) sewage treatment plant with a permitted flow of more than 50 million gallons per day; (5) transfer station or other solid waste facility, or recycling facility receiving at least 100 tons of recyclable material per day; (6) scrap metal facility; (7) landfill; or (8) medical waste incinerator, except such an incinerator that accepts regulated medical waste for disposal that is attendant to a hospital or university and intended to process self-generated waste. Proposed N.J.A.C. 7:1C-1.5.

<sup>8</sup> “New” with respect to a facility is defined as either a facility that has not commenced operation as of the effective date of the regulations or a change in use of an existing facility. Proposed N.J.A.C. 7:1C-1.5.

<sup>9</sup> “Expanding” or “expansion” is defined as a modification or expansion of existing operations or footprint of a facility that has the potential to result in an increase in a facility's contribution to environmental and public health stressors. Proposed N.J.A.C. 7:1C-1.5.

<sup>10</sup> Proposed N.J.A.C. 7:1C-2.1(e).

- **EJ Process for Covered Applicants:** Before NJDEP deems a permit application complete, applicants subject to the proposed regulations would need to complete the following process, plus any actions required by the statutes/regulations under which the permit is issued:
    - **Step 1:** Collect “initial screening information” about the host overburdened community.<sup>11</sup> This includes an analysis of:
      1. The magnitude of various “stressors,” or sources of environmental pollution (e.g., air/water pollution sources, contaminated sites, industrial facilities, conditions that harm public health);
      2. A “geographic point of comparison” (GPC), or the lower of the 50<sup>th</sup> percentile state- or county-wide equivalent (excluding overburdened communities) for:
        - Each stressor and
        - The sum of “adverse” stressors;<sup>12</sup>
      3. Which stressors are “adverse”; and
      4. Whether the overburdened community is subject to “adverse cumulative stressors,” i.e., whether the sum of the overburdened community’s “adverse” stressors exceeds that of the GPC.
    - **Step 2:** Prepare an “environmental justice impact statement” (EJIS) analyzing existing conditions in the overburdened community, the facility’s expected impacts, and whether and how the facility can avoid those impacts. The components of an EJIS are as follow:
      1. All EJISs must include:
        - Background information and initial screening information;
        - Analysis of the facility’s expected impacts on stressors in the overburdened community;
        - A plan for “meaningful public participation” (as described in more detail below); and
        - Proof that the facility will avoid a “disproportionate impact” (creating or worsening “adverse” stressors in the overburdened community).<sup>13,14</sup>
      2. For facilities that cannot avoid a “disproportionate impact” or are in overburdened communities that are already subject to “adverse cumulative stressors,” EJISs must also include “supplemental information” covering topics such as:
        - Topography, protected species, and scenic attributes;
        - Contamination, air quality, environmental media, stormwater management, and climate impacts;
        - Environmental compliance history;
  - Traffic impacts; and
  - Nearby sewage facilities and water and energy supplies.<sup>15</sup>
3. For “new” and “expanding” facilities in overburdened communities that are subject to “adverse cumulative stressors,” the EJIS must:
    - List all control measures needed to avoid the facility contributing to existing adverse stressors, regardless of feasibility, and
    - If a “disproportionate impact” is unavoidable:
      - Propose feasible control measures, prioritizing on-site actions relating to stressors that the facility will actually impact<sup>16</sup> and
      - For new facilities in this category, prove that the facility will serve a “compelling public interest,” i.e., is “necessary” to serve an “essential environmental, health, or safety need” of the overburdened community, and there are “no feasible alternatives” outside the overburdened community to serve that need.<sup>17,18</sup>
  4. For renewal applications for “major source facilities” that are located in an overburdened community subject to adverse cumulative stressors or that cannot demonstrate that they will avoid a disproportionate impact, in addition to all of the general requirements, the EJIS must include:
    - A facility-wide risk assessment,<sup>19</sup> unless
      - The applicant or responsible corporate official certifies that (1) the applicant submitted such an assessment as part of its current effective operating permit; (2) the NJDEP approved that assessment; and (3) no new information or change in use has occurred since the last assessment; and
      - The NJDEP determines that no changes have occurred to the facility-wide risk assessment requirements that would require a new assessment to be performed;<sup>20</sup>
    - **AND** a technical feasibility analysis<sup>21</sup> to reduce emissions to the maximum extent feasible,<sup>22</sup> if the facility’s current effective operating permit includes any equipment or control apparatus that satisfies these criteria:
      - The equipment or apparatus was installed at least 20 years prior to the expiration date of the current effective operating permit;

<sup>11</sup> Proposed N.J.A.C. 7:1C-2.3(b).

<sup>12</sup> “Adverse” refers to a stressor that is higher than an overburdened community’s GPC or would be made higher than the GPC as a result of the facility’s contribution.

<sup>13</sup> Proposed N.J.A.C. 7:1C-1.5.

<sup>14</sup> Proposed N.J.A.C. 7:1C-3.2.

<sup>15</sup> Proposed N.J.A.C. 7:1C-3.3.

<sup>16</sup> Proposed N.J.A.C. 7:1C-5.2, -5.4, -6.2, -6.3.

<sup>17</sup> Proposed N.J.A.C. 7:1C-5.3.

<sup>18</sup> For new or expanding “major source facilities” that serve a compelling public interest, the applicant must also document “Localized Impact Control Technology,” the details of which are set forth at Proposed N.J.A.C. 7:1C-7.1.

<sup>19</sup> As set forth and described at Proposed N.J.A.C. 7:1C-8.4.

<sup>20</sup> Proposed N.J.A.C. 7:1C-8.3(1).

<sup>21</sup> As set forth and defined at Proposed N.J.A.C. 7:1C-8.5.

<sup>22</sup> Proposed N.J.A.C. 7:1C-8.3(2).

- The equipment or apparatus was not subject to review in the 15 years prior to the expiration date of the current effective operating permit; and
- The total emissions of any certain pollutants (fine particulate matter, nitrogen oxide, and volatile organic compounds) from all equipment or apparatus comprise at least 20 percent of the facility's overall potential to emit.
- **Step 3:** NJDEP "administratively reviews" the EJIS within 10 days. This step will confirm administrative completeness of the application. It is not a substantive review.<sup>23</sup>
- **Step 4:** The applicant implements "meaningful public participation," which involves (i) holding a public hearing and (ii) soliciting and responding to written public comments.<sup>24</sup> This includes the following steps:
  1. **Pre-hearing:** Applicants provide several forms of notice to various stakeholders at least 60 days before the hearing. The hearing must (i) be scheduled in or near the overburdened community on a weekday after 6 pm, (ii) have a virtual option, and (iii) be recorded.
  2. **At the hearing:** The applicant presents the EJIS and hears comments from "any interested party regarding the application."
  3. **Post-hearing:** There is a public comment period, after which the applicant provides NJDEP a transcript of the meeting and a summary of, and responses to, the public comments.
- **Step 5:** If needed, the applicant amends the EJIS.
  1. If there is a "material change"<sup>25</sup> to information in the EJIS or the application after EJIS submission and/or public participation, the applicant must amend the EJIS to reflect the change and, possibly, conduct further public participation.<sup>26</sup>
- **Step 6:** NJDEP reviews the application and all associated materials and renders a final decision.
  1. NJDEP reviews the EJIS, testimony, and public comments/responses and, at least 45 days after the public hearing, issues a final decision approving or denying the application. In doing so, NJDEP must follow the following decision process:<sup>27</sup>
    - **First,** (i) find whether the facility will avoid a "disproportionate impact" and (ii) evaluate the feasibility of control measures proposed in the EJIS.
- **Second,** if the facility will avoid a "disproportionate impact," approve the application and impose any control measures "necessary" to avoid the "disproportionate impact."
- **Third,** if the facility will not avoid a "disproportionate impact":
  - **For new facilities:**
    - deny the application, or
    - approve the application only after (i) finding that the facility serves a "compelling public interest" and (ii) imposing any control measures that (a) are "necessary" to avoid impacting and/or would reduce adverse stressors or (b) would provide a "net environmental benefit," including, for instance, supplemental environmental projects.
  - **For expanding facilities:**
    - Approve the application but impose "appropriate" conditions, as determined by the NJDEP, to avoid impacting/reduce adverse stressors or provide a "net environmental benefit."
  - **For major source renewals:**
    - Approve the application but impose "appropriate" conditions, as determined by the NJDEP, to avoid impacting adverse stressors.
- 2. NJDEP may engage external experts, at the applicant's cost, to assist in its review.<sup>28</sup>
- 3. Once NJDEP renders a final decision, for any permit applications filed for that facility in the following five years, NJDEP may find that its initial final decision suffices and applies to the subsequent applications.<sup>29</sup>
- **Administrative and Judicial Review:** Any "person" (not just an applicant) may request an administrative hearing to contest any NJDEP decision under the proposed regulations within 30 days of issuance.<sup>30</sup> NJDEP's final decisions after such administrative hearings are "final agency actions" appealable directly to the Superior Court of New Jersey, Appellate Division.<sup>31</sup>

There are other notable features and ambiguities in the proposed regulations. For instance, NJDEP's decision to define overburdened communities to include adjacent zero-population areas<sup>32,33</sup> is arguably a novel expansion

<sup>23</sup> Proposed N.J.A.C. 7:1C-3.4.

<sup>24</sup> Proposed N.J.A.C. 7:1C-4.1 to -4.3.

<sup>25</sup> Defined as a change to the facility or EJIS that, in NJDEP's determination, "requires further analysis or public comment to accurately assess" the facility's impact on stressors in the overburdened community, such as (but not limited to): (i) a "change to the basic purpose"; (ii) an "expansion of the facility"; (iii) an "increase in the potential contributions to" stressors; or (iv) a "change in measures proposed to address" the facility's impact on stressors. Proposed N.J.A.C. 7:1C-1.5.

<sup>26</sup> Proposed N.J.A.C. 7:1C-4.3(b).

<sup>27</sup> Proposed N.J.A.C. 7:1C-9.2.

<sup>28</sup> Proposed N.J.A.C. 7:1C-9.1(c).

<sup>29</sup> Proposed N.J.A.C. 7:1C-9.3(b).

<sup>30</sup> Proposed N.J.A.C. 7:1C-9.5.

<sup>31</sup> *Id.*

<sup>32</sup> See proposed N.J.A.C. 7:1C-2.1(e).

<sup>33</sup> Under proposed N.J.A.C. 7:1C-2.1(c), "[w]here an overburdened community is located immediately adjacent to a block group that has zero population, and that zero-population block group is the existing or proposed location of a facility, the zero-population block group shall be deemed an overburdened community and shall utilize the highest combined stressor total of any immediately adjacent overburdened community . . . . For purposes of this section, immediately adjacent may include those communities separated by a street, road, or right of way."

from the definition in the EJ Law. Further, NJDEP's sole discretion to hire experts at an applicant's expense<sup>34</sup> will be controversial. And many other questions remain. For instance, how does one define an "interested party" that can comment at a public hearing?<sup>35</sup> Can environmental advocacy groups or other lobbyists enter an overburdened community to rally public support for or opposition to a permit application? Will NJDEP consider this? How will NJDEP determine what qualifies as a "material change" requiring EJIS amendment and additional public input?<sup>36</sup> How will NJDEP determine whether a facility serves a "compelling public interest" or when there is a "significant degree of public interest" requiring consideration of public input in this process?<sup>37</sup> How will NJDEP reconcile the apparent conflict between (i) its ability to consider "unemployment" as a stressor in determining adverse cumulative stressors in an overburdened community<sup>38</sup> and (ii) the prohibition on applicants citing the economic benefits of a facility in showing a "compelling public interest"<sup>39</sup>?

Through public comment and the eventual implementation of these regulations, these questions will or at least should be answered. In the meantime, members of the regulated community with existing, new, or proposed facilities in overburdened communities must monitor the development of these regulations closely and should strongly consider efforts to improve or bolster public perception of the facility. Although the regulations are, in their current state, not yet enforceable, NJDEP has started to apply a form of the environmental justice process to permit applications through Administrative Order 2021-25 (signed by Commissioner Shawn LaTourette in September 2021).

For any questions on the EJ Rule Proposal or environmental justice in general, please contact any of the authors of this article.

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<sup>34</sup> See proposed N.J.A.C. 7:1C-9.1(c).

<sup>35</sup> See proposed N.J.A.C. 7:1C-4.2(b).

<sup>36</sup> See proposed N.J.A.C. 7:1C-4.3(b).

<sup>37</sup> See proposed N.J.A.C. 7:1C-5.3(d).

<sup>38</sup> See proposed N.J.A.C. 7:1C, Appendix.

<sup>39</sup> See proposed N.J.A.C. 7:1C-1.5.

## Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

### **RICHARD F. RICCI**

Partner

Chair, Environmental Law & Litigation

**T: 973.597.2462**

[rricci@lowenstein.com](mailto:rricci@lowenstein.com)

### **ALLISON GABALA**

Counsel

**T: 973.422.6752**

[agabala@lowenstein.com](mailto:agabala@lowenstein.com)

### **MARK S. HEINZELMANN**

Associate

**T: 973.422.2946**

[mheinzelmann@lowenstein.com](mailto:mheinzelmann@lowenstein.com)

### **ZACHARY L. BERLINER**

Associate

**T: 973.422.6434**

[zberliner@lowenstein.com](mailto:zberliner@lowenstein.com)

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