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New Jersey's Final Environmental Justice Rules: NJDEP Response to Comments, Practical Implications, and Applicability

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On April 17, the New Jersey Department of Environmental Protection (NJDEP) published its final Environmental Justice rules (EJ Rules). The EJ Rules stem from New Jersey's first-of-its-kind Environmental Justice Law (EJ Law), enacted in September 2020 (N.J.S.A. 13:1D-157 et seq.). The final EJ Rules do not differ substantively from the proposed rules. Our analysis of the proposed rules can be found here, and it includes a discussion of all the relevant definitions and regulatory steps.

The EJ Law requires the NJDEP to evaluate the environmental and public health impacts that might occur when an existing or proposed facility located in an overburdened community (OBC) applies for certain permits. In connection with their permit application, the EJ rules require such facilities to submit an Environmental Justice Impact Statement (EJIS) analyzing the public health impact (as compared to regional points of comparison) and participate in a 60-day public comment period. In certain instances, where a disproportionate impact on OBCs cannot be avoided, the NJDEP is empowered to deny the permit application unless the applicant can demonstrate a "compelling public interest" or otherwise offset the impact. Even in instances where the NJDEP is not empowered to deny applications, it can still impose special conditions on the permits.

With the EJ rules now active, we will start to see facilities move through the new regulatory scheme, and the NJDEP's practical application of the rules will take shape. While we wait for that process to play out, the NJDEP's responses to public comments, which were published along with the EJ rules and can be found here, provide some initial insight into how the agency will apply the rules. The responses, though not binding, are informal agency guidance. We address some particularly relevant responses to comments below.

Economic Benefit is Not a Compelling Public Interest Factor

The EJ Law requires the denial of a permit for a new facility where such approval would result in adverse cumulative environmental or public health stressors in OBCs. N.J.S.A. 13:1D-160(c). The NJDEP confirmed that the only way an applicant can circumvent such denial is by establishing that the new facility serves a compelling public interest.

In its response to comments, the NJDEP made clear that "compelling public interest" is a narrowly tailored exception that excludes several specific factors. For instance, the NJDEP noted that any economic benefit that the facility offers to the community will **not** be considered. This is notable because of an apparent contradiction with other portions of the EJ rules. Commenters stressed that the NJDEP can consider "unemployment" as a factor in determining adverse cumulative stressors in an OBC, yet it cannot consider the economic benefits of a facility in showing a compelling public interest. The NJDEP pushed back on that comparison as "erroneous." According to the agency, the economic benefits cited by commenters are not directly tied to the local community. On the other hand, in the NJDEP's view, unemployment as a factor is consistent with the spirit and intent of the EJ Law, as it is directly tied to inequities allegedly visited upon the local community. Accordingly, in situations where a compelling public interest analysis is necessary, applicants should know that economic benefits will not be considered.

Adjacent Zero-Population Block Groups

One of the more surprising innovations in the final EJ rules was the expansion of OBCs to include adjacent zero-population block groups. Public commentors urged the NJDEP to reconsider that expansion because it is well beyond the scope of the EJ Law's OBC definition. In response, the NJDEP explained that including adjacent zero-population block groups is well within its discretion. The agency feels that the expansion is necessary to capture a facility's contribution to the cumulative environmental and public health stressors in a directly adjacent OBC. However, the agency clarified that it was not expanding the definition of OBCs, as the adjacent zero-population block group itself is not considered an OBC. Applicants must be aware that existing or proposed facilities located in zero-population block groups immediately adjacent to OBCs will be subject to the EJ rules.

The Scope of "Interested Parties"

During the required public hearing, an applicant must accept and respond to written and oral comments from **any** interested party. N.J.A.C. 7:1C-4.2(b). Public commentors suggested that an applicant's obligation to respond to comments should be limited to comments from members of an OBC. In response, the NJDEP noted that interested parties can include individuals who do not work or reside in an OBC but may nonetheless accurately represent the community's interests, such as national advocacy groups. This opens up the potential for OBCs to become a battleground between advocacy groups in opposition to a new or existing facility and the facility itself. But the NJDEP also noted that applicants need only respond to relevant comments, and to the extent any comments are irrelevant to the facility under review or otherwise are unrelated to the standards set forth in the EJ rules, they may effectively be ignored. The NJDEP explained that the applicant need only indicate such comments' nonapplicability. The NJDEP also made clear that any permit conditions it requires will be limited to comments germane to that particular facility and project.

Unanswered Questions Remain

While the NJDEP responded to many of the comments submitted on the EJ Rules, some key questions remain unanswered.

Experts Hired by the NJDEP

According to the EJ rules, the NJDEP has sole discretion to hire a third-party expert or experts, at the applicant's expense, to evaluate certain information submitted by the applicant. N.J.A.C. 7:1C-9.1(c). Given the novelty of issues that may arise under the EJ rules, it is unclear how often the NJDEP may need to retain experts or how much such experts would charge, leaving the regulated community open to potentially significant costs. In an effort to ease those concerns, the NJDEP has said that it will only hire third-party experts in limited circumstances where its staff lacks nuanced understanding of a specific issue. But the NJDEP did not give any specific examples of issues that would require it to hire third-party experts, nor did it give the applicants any say in the process. It appears to be only a matter of time before an applicant challenges the NJDEP's decision to retain an expert and the resultant charges.

'Significant Degree of Public Interest' Will Be Evaluated on a Case-by-Case Basis

When evaluating whether a compelling public interest exists for an applicant to survive a mandatory permit denial, the EJ rules allow the NJDEP to consider a "significant degree of public interest in favor of or against an application[.]" N.J.A.C. 7:1C-5.3(d). While commentors requested a definition of the term "significant degree of public interest," the NJDEP declined, responding that given the diversity of OBCs in New Jersey, it would be "infeasible" to provide a definition. "Significant degree of public interest" will instead be measured on a case-by-case basis. However, the NJDEP did share that in performing this analysis, it would consider, among other things, (i) the relative volume of comments in relation to the overall population of the OBC, (ii) whether public interest is consistently in support of or opposition to the applicant, and (iii) evidence (or lack thereof) that the significant degree of public interest is from members of the OBC. Facilities are advised to closely monitor the status of ongoing permit applications to see how the NJDEP will carry out the significant degree of public interest analysis.

Because there are so few case studies showing how the NJDEP will implement the EJ rules, the regulated community remains concerned that the EJ rules will chill development in the state and stymie new construction, especially considering that most of New Jersey is currently considered an OBC. The NJDEP disagrees, arguing that a reduction in localized environmental and public health stressors will improve economic activity in those communities. Time will tell. For now, subject facilities and future applicants should do some advance planning to the greatest extent possible on their path through the environmental justice process. Environmental lawyers and consultants can be critical contributors to that planning.

Is a Permit Application Subject to the AO Process or the Final EJ Rules Process?

As a final note, there is some confusion as to whether, based on its filing date, a permit application is subject to the final EJ rules or the less-stringent process under Administrative Order (AO) No. 2021-25, which was implemented by the Commissioner of the NJDEP in September 2021 as a stopgap between the EJ Law and the EJ rules. NJDEP guidance states that where an "administratively complete" permit application was filed before the EJ rules were finalized, the application is subject to the AO process. If it was filed after the EJ rules were finalized, then the application must proceed through the full EJ rules process. An open question remains in a scenario where an administratively complete application was filed before the EJ Law was enacted; are such applications subject to any environmental justice process? There is a strong argument that they are not. Applicants with pending permit applications (particularly those that receive notice from the NJDEP of environmental justice applicability) should carefully consider which process applies.

If you have any questions about the Environmental Justice Law or rules, or how these developments may impact you, please contact the authors of this alert.

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