

## New Jersey's Environmental Justice Law: A Potential Model for EJ National Focus

New Jersey's recently enacted Environmental Justice Law is being characterized as one of the broadest in the United States and is seen as a potential legal model for other states and the federal government.<sup>1</sup> The new law has gained the attention of President-Elect Joe Biden, who intends to establish an office concerning environmental justice within the Department of Justice.<sup>2</sup> In short, the law requires evaluation of the impact of a facility on the surrounding community in connection with certain permits, and empowers the New Jersey Department of Environmental Protection (NJDEP) to deny permits if disproportionate impacts on an overburdened community are found. While the new law contains a strong framework for addressing environmental justice, complicated issues perhaps should be considered and resolved before the law can take effect and serve as a model for other jurisdictions. This writing provides an overview of the law and offers questions for consideration before the law's implementation.

There has been a growing discussion regarding the siting of facilities with significant environmental impacts in low-income, typically urban communities. According to the NJDEP and the United States Environmental Protection Agency (USEPA), environmental justice efforts work to respond this discussion by ensuring "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."<sup>3</sup>

The New Jersey Environmental Justice Law incorporates environmental justice considerations into the permitting process for certain environmental permit applications and renewals. Where applicable, the law specifically requires: the submission of an environmental justice impact statement (EJIS); public notice in at least one Spanish-print newspaper; and conduct of a public hearing for any application for certain permits to expand, construct or renew the authorization to operate a covered facility in an overburdened community. The purpose of the impact statement is to supplement the permit application with additional information about the cumulative impact of the proposed change, and to evaluate whether there is a disproportionate impact stemming from environmental and public health stressors associated with the project. If the NJDEP determines that there is a disproportionate impact for a new facility, the NJDEP may deny the relevant permit application unless there is a compelling public interest. The NJDEP may also grant the permit after imposing conditions to mitigate potential impacts. If there is a disproportionate impact for an existing facility, NJDEP may not deny the permit and may only impose conditions.

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<sup>1</sup> New Jersey Governor Phil Murphy has made environmental justice a priority during his administration, and recently signed New Jersey's unprecedented Environmental Justice Law (P.L. 2020, c. 92/S232) on September 18, 2020.

<sup>2</sup> Preparing for Increased Focus on Environmental Justice Issues in a Biden Administrations. National Law Review. First Published on December 3, 2020 and retrieved from <https://www.natlawreview.com/article/preparing-increased-focus-environmental-justice-issues-biden-administration>

<sup>3</sup> [https://www.epa.gov/environmentaljustice/learn-about-environmental-justice#:~:text=Environmental%20justice%20\(EJ\)%20is%20the,environmental%20laws%2C%20regulations%20and%20policies.https://www.nj.gov/dep/ej/docs/ej-pres-20201022.pdf](https://www.epa.gov/environmentaljustice/learn-about-environmental-justice#:~:text=Environmental%20justice%20(EJ)%20is%20the,environmental%20laws%2C%20regulations%20and%20policies.https://www.nj.gov/dep/ej/docs/ej-pres-20201022.pdf)

As noted, the law only applies to covered facilities that seek applicable permits within an overburdened community.

- The legislation defines “covered facilities” as including several different types of waste management and recycling operations, as well as any facility with a major source air permit - commonly known as a Title V permit - often including manufacturing and energy facilities.
- The legislation defines “applicable permits” as including “any individual permit, registration, or license” issued under numerous New Jersey laws relating to environmental matters, including solid waste and recycling, natural resources, air pollution, water pollution, and land use. Notably, the definition includes only individual permits, which, as the name suggests, contain requirements specifically tailored to the individual facility. As a result, the definition may not include general permits, permits-by-rule, or other standardized permits. Additionally, while the legislation applies to all covered permits for a new facility or for the expansion of an existing facility, it only applies to the renewal of a Title V permit and not the renewal of any other covered permits.
- Lastly, the legislation’s definition of “overburdened community” is based on certain socio-economic demographics. If a specified percentage of any specific demographic is present in a community, that community will be considered an overburdened community. According to [NJ Spotlight](#), “the . . . definition of ‘overburdened communities’ could apply to more than 300 municipalities and over 4 million residents.”

Importantly, the foregoing requirements of the Environmental Justice Law do not take effect and therefore will not apply to any facilities or permits until the NJDEP enacts regulations to implement the law. There are several significant issues that the NJDEP must resolve. The complexity of these issues cannot be overstated, and the implementation of regulations must match this complexity with clear guidance and objective metrics for affected facilities to follow.

A few of the key issues that must be addressed are as follows:

- **Preparation of the Environmental Justice Impact Statement** As noted above, the touchstone of the Environmental Justice Law is the preparation of an EJIS to assess the environmental impact of a facility. The NJDEP will use this report to determine whether a facility has a disproportionate environmental impact on the community in which it is located; and, if so, whether to respond to the permit application by granting, denying, or imposing conditions. However, the Environmental Justice Law does not explicitly define the specific components of the EJIS, the environmental impacts that must be considered as part of the EJIS, or how to calculate and compare these environmental impacts against each other. To illustrate the importance of these issues, consider a biogas facility that will require a Title V permit and is to be in an overburdened community. Under the Environmental Justice Law, the facility would need to prepare an environmental justice impact statement. But what impacts should the facility consider? Under the broadest interpretation of the Environmental Justice Law, the facility might need to consider various impacts, such as air emissions from the facility and

associated operations, including: truck traffic; waste and storm water discharges; noise pollution; disruption of green space and or natural resources as a result of construction; psychological effects of the facility on the community; and more. The facility would then need to determine how to calculate and compare these impacts to non-overburdened communities, because the goal of the legislation is to determine the overall, holistic impact of a facility on the community in which it is located. Therefore, the legislation ultimately requires an evaluation of disproportionate impact — the NJDEP must compare the impact of the project in an overburdened community against the impacts associated with another community. As a result, NJDEP (or the permit applicant) will need to assess the impacts associated with the overburdened community and another community or metric to be chosen for purposes of comparison. The law provides broad discretion to NJDEP to dictate the appropriate community comparisons, and NJDEP should clarify these issues before the statute can be implemented.

- **Scope of NJDEP Authority to Impose Permit Conditions** The Environmental Justice Law provides that the permit conditions are to be imposed “on the construction and operation of the facility to protect public health” and are intended “to avoid or reduce the adverse environmental or public health stressors affecting the overburdened community.” Case law from federal courts in similar circumstances suggests that permit conditions must demonstrate a “nexus” and “rough proportionality” between the conditions being imposed and the environmental impact. In other words, there must be a direct connection between the harm caused by the facility and the condition being imposed, and the condition must be similar in size and nature to the harm involved. There are many more questions regarding how and when NJDEP will impose permit conditions, including:
  - Are facilities automatically required to make all possible reductions of environmental impacts before conditions are considered?
  - Are conditions that address one environmental impact, such as air pollution, appropriate for facilities that primarily have a different impact, such as water pollution?

It is less likely that NJDEP will clearly define its authority to impose permit conditions, preferring instead to address conditions on a case by case basis. But this aspect of the law may be the most likely to be challenged by permit applicants and as such still bears greatly on the implementation of the law. Finally, it is important to note that NJDEP has indicated that monetary burden will not be an acceptable argument to avoid these permit conditions; however, monetary burden will likely need to be considered when evaluating the proportionality of the conditions.

- **Considerations Specific to Facilities with Significant Air Emissions** Facilities with major source permits (aka Title V Air Permits) are one of the largest applicable groups subject to the new law, but, as confirmed informally by NJDEP, only about half of the Title V facilities within the state are within overburdened communities. Existing major air sources are no strangers to strenuous monitoring, testing, reporting, and control requirements. The Federal Title V Air Program and other federal regulations, such as the National Emission Standard for Hazardous Air Pollutants and New Source Performance Standards, already include significant conditions for a given source category. Therefore, the state agencies often implement their own targeted regulations

to address specific air issues within that state, such as a nonattainment area, or more recently in New Jersey, hazardous air pollutant risk reduction.

As noted above, the EJIS evaluates the environmental and public health impacts associated with a facility, including air emissions. Air impacts are compared to specific thresholds that have been established based on health and environmental risk factors. For instance, NJDEP recently updated their Risk Screening Worksheet (RSW) and revised downward many of their Hazardous Air Pollutant (HAP) thresholds — a HAP is a pollutant known to cause cancer and other serious health impacts. The RSW process provides a useful and recent starting point for air impact examinations, because it establishes pollutant thresholds based on the risks associated with environmental and public health impacts. There is also the possibility that the NJDEP may seek to require emissions reductions even if impacts are below existing thresholds. There is also the question of how facilities that do not produce HAP emissions will proceed. If HAP facilities are provided with gating criteria, the same consideration should be expected for non-HAP facilities.

If a facility potentially has high air impacts, it should consider conducting air dispersion modeling and risk assessments in order to establish their emissions do not substantially impact the surrounding community. A similar model with a gating criterion could be used across other non-air media as the first step in a process that could then lead to more detailed analysis.

The Environmental Justice Law focuses on cumulative impacts of a facility on their neighboring community and must consider all potentially positive and negative impacts from that facility. Relative impact on the community will ultimately be based on the thresholds outlined in the DEP implementation regulations and the scope of parameters allowed within the EJIS. While the Environmental Justice Law is garnering a great deal of attention for its scope and potential impacts within the state, care must be taken with the implementation regulations to provide a clear framework for affected facilities, which is not expected until late 2021 at the earliest. The NJDEP has continued the stakeholder process on these transformational regulations and the authors of this article will continue to watch for developments.

*Article is a follow up to an October 2020 AECOM/Riker Danzig webinar, “New Jersey’s New Environmental Justice Law: An Overview of the EJ Law and Possible Implications for Affected Facilities.” Whitehead, Chris; Voit, Kevin; Karmel, Matthew.*