

New Jersey's First-in-the-Nation State Environmental Justice Law

On September 18, 2020, New Jersey Governor Phil Murphy signed Senate Bill 232 into law requiring the New Jersey Department of Environmental Protection (NJDEP) “to evaluate the environmental and public health impacts of certain facilities on overburdened communities when reviewing certain permit applications.”¹ The law makes New Jersey first in the nation to require mandatory permit denials under state law for new facilities and to expressly allow the imposition of conditions on renewal and expansion permits for existing facilities based on environmental justice (EJ) concerns alone. A denial will be required for new facilities “where an [EJ] analysis determines a facility will have a disproportionately negative impact on overburdened communities.”² The new EJ law is effective immediately, although it awaits the adoption of implementing rules and regulations by NJDEP.³

President Bill Clinton’s 1994 Executive Order 12898 established an Interagency Working Group on Environmental Justice at the federal level.⁴ However, the order did not mandate evaluation of EJ concerns in environmental permitting decisions governed by federal law. In a number of other state and local jurisdictions, EJ considerations have been incorporated both through regulation and through guidance for broader environmental programs. For example, under New York Department of Environmental Conservation Commissioner Policy 29⁵ and Public Service Commission regulations,⁶ permit applicants for both environmental and utilities’ permits are required to consider disproportionate impacts on EJ communities (which New Jersey refers to as “overburdened communities”) and prepare a statement of EJ issues as part of their application; this requirement does not, however, impose a substantive obligation to deny permits due to significant adverse EJ impacts.

New Jersey’s newly implemented EJ law takes EJ concerns one step further by covering a wide array of permitting decisions, governed by state and federal law⁷ that will require an EJ analysis not only for completeness purposes, but also for substantive review. The new law captures eight types of facilities, including facilities that typically suffer from the classic “Not in My Backyard” (NIMBY) reaction from local citizens. They are:

- Major sources of air pollution;⁸
- Resource recovery facilities or incinerators;
- Sludge processing facilities, combustors, or incinerators;
- Sewage treatment plants with a capacity of more than 50 million gallons per day;
- Transfer stations or other solid waste facilities, or recycling facilities intending to receive at least 100 tons of recyclable material per day;
- Scrap metal facilities;
- Landfills, including, but not limited to, landfills that accept ash, construction, or demolition debris, or solid waste; and
- Certain medical waste incinerators, excluding those attendant to a hospital or university for disposal of self-generated regulated medical waste.⁹

An “overburdened community” is defined as “any census block group, as determined in accordance with the most recent U.S. Census, in which: (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a state recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency.”¹⁰ NJDEP has 120 days to publish a list of such communities. Estimates indicate, “there are approximately 310 municipalities with populations totaling



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approximately 4,489,000 that have overburdened communities within their municipalities.”¹¹ New Jersey has 565 municipalities in total.¹² Estimated data from the U.S. Census Bureau indicates a total New Jersey population of 8,882,190 as of July 1, 2019.¹³

The new law effectively changes the standard NJDEP completeness review of permits by providing that a permit application will not be complete unless and until the applicant prepares an EJ impact statement, which it must transmit at least 60 days in advance of the public hearing (with all required notices) that the applicant is required to organize and conduct in the overburdened community.¹⁴ The EJ impact statement requires assessment of “the potential environmental and public health stressors¹⁵ associated with the proposed new or expanded facility, or with the existing major source, as applicable, including any adverse environmental or public health stressors that cannot be avoided if the permit is granted, and the environmental or public health stressors already borne by the overburdened community as a result of existing conditions located in or affecting the overburdened community.”¹⁶ An exception to the EJ impact statement has been created for permits needed to undertake remediation or for minor modifications of a facility’s major source permit for activities or improvements that “do not increase emissions.”¹⁷ Where EJ review is required, NJDEP permit determinations will not issue for at least 45 days after the public hearing.¹⁸

The law makes a distinction between new and existing facilities by *requiring* NJDEP to deny a permit for new facilities in certain circumstance, while *allowing* NJDEP to impose conditions in a permit for expansion of an existing facility or the renewal of an existing facility permit. For new facilities, a denial determination must follow a finding that the permit:

would, together with other environmental or public health stressors affecting the overburdened community cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities within the State, county, or other geographic unit of analysis as determined by the department pursuant to rule, regulation, or guidance adopted or issued pursuant to section 5 of this act.¹⁹

Notwithstanding an adverse finding, NJDEP may still grant a permit as an exception where the facility “will serve a compelling public interest in the community where it is to be located,” provided certain conditions on the construction and operation of the facility are imposed.²⁰

In comparison to new facilities, the law does not require or even expressly allow NJDEP to deny existing permit renewals and/or expansions based on EJ concerns alone. Instead, NJDEP may impose conditions after consideration of the EJ analysis, an analysis identical to that imposed on new facilities.²¹

Given the breadth of potentially affected municipalities and communities, we anticipate that the developing administrative law regarding the EJ review standard and exceptions to the standard will be one to keep track of in the forthcoming rulemaking and in NJDEP’s case-by-case determinations going forward. Covered facilities (including, but not limited by the law to, major sources such as power plants, co-generation facilities, refineries, and manufacturing or other stationary locations that utilize major emitting sources such as large boilers, engines, or emergency generator equipment) will want to monitor the NJDEP’s rulemaking proceedings and keep informed of their development and promulgation in order to prepare for compliance with the requirements of New Jersey’s EJ law. Other interested and potentially affected entities and projects may wish to do likewise.

¹ <https://nj.gov/governor/news/news/562020/approved/20200918a.shtml>

² *Id.*

³ An Act concerning the disproportionate environmental and public health impacts of pollution on overburdened communities, and supplementing Title 13 of the Revised Statutes (New Jersey EJ Law), Pub. L. No. 2020, c.92, §§ 3,6 (Sept. 18, 2020), adopted S232 bill available at https://www.njleg.state.nj.us/2020/Bills/S0500/232_R2.PDF

⁴ <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>

⁵ New York State Dep't of Env'tl Conservation, *Commissioner Policy 29 – Environmental Justice and Permitting* (March 19, 2003), available at <https://www.dec.ny.gov/regulations/36951.html>

⁶ 6 N.Y.C.R.R. 487.1 *et seq.*

⁷ The Section 2 definition of "Permit" cites the following: R.S.12:5-1 *et seq.*; P.L.1975, c.232 (C.13:1D-29 *et al.*); the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 *et seq.*); section 17 of P.L.1975, c.326 (C.13:1E-26); the "Comprehensive Regulated Medical Waste Management Act," P.L.1989, c.34 (C.13:1E-48.1 *et al.*); P.L.1989, c.151 (C.13:1E-99.21a *et al.*); the "New Jersey Statewide Mandatory Source Separation and Recycling Act," P.L.1987, c.102 (C.13:1E-99.11 *et al.*); the "Pesticide Control Act of 1971," P.L.1971, c.176 (C.13:1F-1 *et seq.*); "The Wetlands Act of 1970," P.L.1970, c.272 (C.13:9A-1 *et seq.*); the "Freshwater Wetlands Protection Act," P.L.1987, c.156 (C.13:9B-1 *et al.*); the "Coastal Area Facility Review Act," P.L.1973, c.185 (C.13:19-1 *et seq.*); the "Highlands Water Protection and Planning Act," P.L.2004, c.120 (C.13:20-1 *et seq.*), the "Air Pollution Control Act (1954)," P.L.1954, c.212 (C.26:2C-1 *et seq.*); the "Water Supply Management Act," P.L.1981, c.262 (C.58:1A-1 *et al.*); P.L.1947, c.377 (C.58:4A-5 *et seq.*); the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 *et seq.*); P.L.1986, c.102 (C.58:10A-21 *et seq.*); or the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 *et seq.*).

⁸ The definition of "major source" in the EJ law relies on the definition in other federal and state laws, without exception and setting an absolute floor of 100 tons per year (tpy) for any Clean Air Act regulated "air pollutant." New Jersey EJ Law, § 2. New Jersey's threshold for major sources is particularly stringent. For example, New Jersey is designated as a severe non-attainment zone for ozone. Thus, just 25 tpy of NOx emissions, an ozone precursor, would qualify a facility as a major source. The definition would also capture routine gathering places such as schools and hospitals that may need a major source general permit from NJDEP for operating equipment.

⁹ *Id.* § 2.

¹⁰ *Id.*

¹¹ *See supra*, n.1

¹² https://www.njstatelib.org/research_library/new_jersey_resources/highlights/municipalities_by_county/

¹³ <https://www.census.gov/quickfacts/NJ>

¹⁴ New Jersey EJ Law, § 4.a.

¹⁵ Under Section 2, such stressors are defined as "sources of environmental pollution, including, but not limited to, concentrated areas of air pollution, mobile sources of air pollution, contaminated sites, transfer stations or other solid waste facilities, recycling facilities, scrap yards, and point-sources of water pollution including, but not limited to, water pollution from facilities or combined sewer overflows; or conditions that may cause potential public health impacts, including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease, and developmental problems in the overburdened community."

¹⁶ New Jersey EJ Law, § 4.a(1).

¹⁷ *See id.* § 2 ("Permit" definition).

¹⁸ *Id.* § 4.b.

¹⁹ *Id.* § 4.c.

²⁰ *Id.*

²¹ *Id.* § 4.d.