March 10, 2021

Via E-mail

Shawn LaTourette, Acting Commissioner (shawn.latourette@dep.nj.gov)
Sean Moriarty, Chief Advisory for Regulatory Affairs (sean.moriarty@dep.nj.gov)
Department of Environmental Protection
401 E State St
Trenton, NJ 08625

New Jersey Environmental Justice Law Rulemaking: Stakeholder Comments

I. INTRODUCTION

The frustration is never higher in a state's environmental justice (EJ) advocacy community than when an additional polluting facility is sited in a community Of Color or low-income community that is already burdened by more than its fair share of pollution. The concern is that these vulnerable and overburdened communities already suffer from health disparities rooted in race and income that will be exacerbated by additional pollution emitted by an additional facility.[1] Risks and impacts created by multiple pollutants emitted by multiple sources in a community that interact with each other and social vulnerabilities[2] have been termed cumulative impacts, and the EJ community has been calling for the development of policies to address this threat to neighborhoods for well over a decade. Frustration over the siting of polluting facilities in EJ

[1] This point has been made in a number of other comments submitted to the state by the New Jersey EJ community. For example, *see* New Jersey Environmental Justice Alliance, *Comments on the Newark Energy Center Application for a Title V Operating Permit Significant Modification* (Program Interest Number 08857, Permit Activity Number BOP160001, prepared by Nicky Sheats, at 2-3 (11/14/16)). Here we reproduce the citations on health disparities: *Health, United States, 2012: With Special Feature on Emergency Care,* National Center for Health Statistics (2013); Rachel Morello Frosch et al., *Understanding the Cumulative Impacts of Inequalities In Environmental Health: Implications for Policy* 30 Health Aff. 879, 880-881 (2011); Nancy Adler and David Rehkopf, *US Disparities in Health: Descriptions, Causes, and Mechanisms,* 29 Ann. Rev Pub, Health 235 (2008); William Dressler et al., *Race and Ethnicity in Public Health Research: Models to Explain Health Disparities,* 34 Ann. Rev. Anthropology 231 (2005); Roberta Spalter-Roth et al., *Race, Ethnicity, and the Health of Americans,* American Sociological Association Series On How Race And Ethnicity Matter, Sydney S. Spivack Program In Applied Soc. Rsch. And Soc. Pol'y (2005), http://www2.asanet.org/centennial/race_ethnicity_health.pdf; George Mensah et al., *State of Disparities in Cardiovascular Health in the United States,* 111 Circulation 1233 (No. 10) (2005).

[2] See Cumulative Impacts: Building a Scientific Foundation, CALIFORNIA EPA, at 3 (2010); Ensuring Risk Reduction in Communities with Multiple Stressors: Environmental Justice and Cumulative Risks/Impacts, NAT'L ENV'T JUST. ADVISORY COUNCIL, at 5 (2004).

communities, *i.e.*, communities Of Color and low-income communities, was particularly high in New Jersey for many years partly because the State had not only acknowledged, but also developed important information on, the issue. In 2009, the New Jersey Department of Environmental Protection (NJDEP) released a cumulative impacts screening tool that confirmed what many in the EJ community already knew: there exists a problematic relationship between race, income, and pollution in New Jersey. Figures made possible by the screening tool show that the estimated amount of pollution and the number of polluting facilities in New Jersey communities increases as the proportion of either low-income or Of Color residents increases.[3] In 2012, NJDEP acknowledged that New Jersey's largest city was suffering from a cumulative impacts problem when it stated in a fact sheet that accompanied the application for an air pollution permit for the then proposed Hess power plant (current Newark Energy Center) that "Newark is an area where the NJDEP has recognized there are disproportionate impacts from multiple sources of pollution."[4]

It is also important to note that the data that reveals higher estimated pollution loads in New Jersey EJ communities is part of a trend that has been known and understood for quite some time in our nation. For example, a number of studies have demonstrated that residents of EJ communities experience elevated exposures to air pollution[5] including a recent EPA study that calculated that Blacks face a fine particulate matter burden that is 1.54 times that of the general population.[6]

---

[3] These figures can be found on page five of a technical report and slide 19 of a power point which are both entitled "A Preliminary Screening Method to Estimate Cumulative Environmental Impacts." The report and power point can be accessed at http://www.state.nj.us/dep/ej/docs/ejc_screeningmethods20091222.pdf and http://www.state.nj.us/dep/ej/docs/ejc_screeningmethods_pp20091222.pdf, respectively.

[4] NJDEP Fact Sheet for the proposed Hess NEC power plant (Program Interest Number 08857, Permit Activity Number BOP11000; hereinafter referred to as the NJDEP Fact Sheet) at 24.

[5] This has also been noted by the New Jersey EJ community in a number of other comments submitted to the state. For example, *see* New Jersey Environmental Justice Alliance, *supra* note 1. Here we reproduce the citations on differential exposure to air pollution: Michael Ash et al., *Justice in the Air: Tracking Toxic Pollution from America's Industries and Companies to Our States, Cities, and Neighborhoods* (2009); Manuel Pastor et al., *The Air is Always Cleaner on the Other Side: Race, Space, and Ambient Air Toxics Exposures in California, 27* J.OF URB. AFFS. 127 (No. 2) (2005); Douglas Houston et al., *Structural Disparities of Urban Traffic in Southern California: Implications for Vehicle Related Air Pollution Exposure in Minority and High Poverty Neighborhoods,* 26 J. OF URB. AFFS. 565 (No. 5) (2004); Manuel Pastor et al., *Waiting to Inhale: The Demographics of Toxic Air Release Facilities in 21st-Century California,* 85 SOC. SCI. Q. 420 (No. 2) (2004); Michael Jerrett et al., *A GIS- Environmental Justice Analysis of Particulate Air Pollution in Hamilton, Canada,* 33 ENV'T AND PLAN. A 955 (No. 6) (2001); D.R. Wernette and L.A. Nieves, *Breathing Polluted Air,* 18 EPA JOURNAL 16 (1992).

[6] Ihab Mikati et al., Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status, 108 AJPH 4 (2018).

The acknowledgement of a cumulative impacts problem by NJDEP and the knowledge of a relationship between pollution, race and income that violates a sense of justice often espoused not only by our State but also by our country made it imperative that New Jersey directly address this issue through some type of substantive policy. The Environmental Justice Law ("EJ Law")[7] adopted by the state of New Jersey in late August 2020 is a significant positive step in this direction. It calls for the state to deny or place conditions on pollution permit applications under certain circumstances.[8]

In many ways, addressing cumulative impacts in the context of pollution permits, as the New Jersey legislation does, has been the holy grail of the EJ movement. But even though the New Jersey law is a meaningful start, it should not be expected to completely address the state's cumulative impacts problem by itself. It might best be seen as a lifeline to New Jersey residential EJ communities when it comes to disproportionate pollution burdens, but more needs to be done to achieve a full rescue. The EJ advocacy community in New Jersey and its allies have come to believe that it will take a suite of policies to coherently address cumulative impacts in the state; in other words, it will require cumulative policies to address cumulative impacts. Some of these policies will directly address cumulative impacts, as does the recent New Jersey legislation, and others will address specific types of pollution that contribute to disproportionate pollution burdens in EJ communities. One type of policy that should be used in this battle is climate change mitigation policy, and the EJ community has already submitted a proposal to the state that would require power plants located in EJ communities to reduce their emissions and in that way, reduce locally harmful GHG co-pollutants.[9]

Of primary importance at the moment is the development of a strong set of regulations that will implement New Jersey's EJ law. New Jersey must not shrink from this task which is as important as the adoption of the legislation itself. The regulations should ensure that the law fulfills its intent, which is to prevent New Jersey EJ communities from enduring more pollution than other communities. They must also break the very disturbing and unacceptable relationship that now exists in New Jersey between race, income and pollution. If these two objectives are achieved, the New Jersey EJ community and its allies believe that eventually pollution will be reduced everywhere because our state will be forced to develop methods and operations to decrease pollution in general, since EJ residential communities will no longer be available to receive pollution on behalf of other communities.

---

[7] S.B. 232, 219th Leg., Reg. Sess. (N.J. 2020)

[8] Id. at 3(3)(b)

[9] Nicky Sheats, Achieving Emissions Reductions For Environmental Justice Communities Through Climate Change Mitigation Policy, 41 William and Mary Env't L. and Pol'y Rev. 377 (2017); New Jersey Environmental Justice Alliance Climate Change and Energy Policy Platform, NEW JERSEY ENVIRONMENTAL JUSTICE ALLIANCE (2017).

This document contains informal comments submitted to NJDEP by the Ironbound Community Corporation (ICC),[10] Clean Water Action,[11] the New Jersey Environmental Justice Alliance (NJEJA),[12] and Earthjustice[13] on the regulations being developed to implement the New Jersey EJ Law. They contain preliminary thinking from these groups on the following issues relevant to the regulations: the scope of the definition of "facility;" the type of public participation that should be part of the development process for, and the operations of, the regulations; the meaning of "compelling public interest"; the types of conditions that can and should be placed on pollution permit applications; and the types of environmental and public health stressors the regulations should utilize and consider. ICC, Clean Water Action, NJEJA, and Earthjustice will submit additional informal comments in several months as our thinking develops and evolves on the topics detailed above, and on other important and relevant issues related to the regulations. These organizations will also file formal comments on the regulations at the appropriate time.

II. DEFINITION OF "FACILITY"

The EJ Law defines the term "facility" to include eight categories of facilities:[14]

> "Facility" means 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 capacity of more than 50 million gallons per day; (5) transfer station or other solid waste facility, or recycling facility intending to receive at least 100 tons of recyclable material per day; (6) scrap metal facility; (7) landfill, including, but not limited to, a landfill that accepts ash, construction or demolition debris, or solid waste; or (8) medical waste incinerator; except that

[10] The Ironbound Community Corporation's mission is to engage and empower individuals, families, and groups in realizing their aspirations and, together, work to create a just, vibrant and sustainable community.

[11] Clean Water Action's mission statement reads as follows: "Since our founding during the campaign to pass the landmark Clean Water Act in 1972, Clean Water Action has worked to win strong health and environmental protections by bringing issue expertise, solution-oriented thinking and people power to the table." www.cleanwater.org/nj.

[12] The NJEJA mission statement reads as follows: "The New Jersey Environmental Justice Alliance is an alliance of New Jersey-based organizations and individuals working together to identify, prevent, and reduce and/or eliminate environmental injustices that exist in communities of color and low-income communities. NJEJA will support community efforts to remediate and rebuild impacted neighborhoods, using the community's vision of improvement, through education, advocacy, the review and promulgation of public policies, training, and through organizing and technical assistance."

[13] The Earthjustice mission statement reads as follows: "Earthjustice is the premier nonprofit public interest environmental law organization. We wield the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change."

[14] N.J.S.A. 13:1D-158.

> "facility" shall not include a facility as defined in section 3 of P.L.1989, c. 34 (C.13:1E-48.3) that accepts regulated medical waste for disposal, including a medical waste incinerator, that is attendant to a hospital or university and intended to process self-generated regulated medical waste.

NJDEP must interpret each of these categories broadly so that its regulations do not "alter the terms of [the] legislative enactment or frustrate the policy embodied in the statute." *T.H. v. Div. of Developmental Disabilities*, 189 N.J. 478, 491 (2007). Declaring that "it is past time" to correct the "legacy of siting sources of pollution in overburdened communities," the Legislature emphasized the impacts of "pollution from numerous industrial, commercial, and governmental facilities." N.J.S.A. 13:1D-157. The Legislature described these "numerous" polluting facilities as those "certain types of facilities which, by the nature of their activity, have the potential to increase environmental and public health stressors." *Id.* NJDEP must therefore interpret "facility" to include those types of facilities that are known to cause, or have the "potential" to cause, increases in public health stressors.[15] In addition, nothing in the EJ Law would allow NJDEP to exclude from the term "facility" those polluting facilities that also provide some public benefit to a given community. The language of the EJ Law *already* incorporates consideration of a facility's public benefits by allowing conditioned permits based on "a compelling public interest in the community where it is to be located." N.J.S.A. 13:1D-160(c). If "facility" were defined according to whether facilities potentially provide benefits to the community, NJDEP would impermissibly render the Legislature's "compelling public interest" provision superfluous and bypass the public process that the Legislature clearly intended to precede the "compelling public interest" determination.[16]

1. Definition of "Major Source of Air Pollution"

The EJ Law defines "major source of air pollution" as:[17]

> [A] major source of air pollution as defined by the federal "Clean Air Act," 42 U.S.C. s.7401 et seq., or in rules and regulations adopted by the department pursuant to the "Air Pollution Control Act," P.L.1954, c. 212 (C.26:2C-1 et seq.) or which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant, or other applicable criteria set forth in the federal "Clean Air Act," 42 U.S.C. s.7401 et seq.

---

[15] *Id.*; *See also* N.J.S.A. 13:1D-160(1),(3) (Applicants must include "potential environmental and public health stressors" associated with facility in their EJIS and at the public hearing.).

[16] *Paff v. Ocean Cnty. Prosecutor's Off.*, 235 N.J. 1, 22 (2018) ("Legislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless.") (alterations omitted).

[17] N.J.S.A. 13:1D-158

a. NJDEP Should Define "Major Source of Air Pollution" According to the Lowest Available Emission Thresholds.

When determining whether a facility is a "major source of air pollution" under the EJ Law, NJDEP must apply the lowest applicable "major source" emission thresholds available in either the federal Clean Air Act, the New Jersey Air Pollution Control Act and its implementing regulations, or the EJ Law's own "one hundred tons per year" threshold. N.J.S. 13:1D-158. Any other approach would "frustrate the policy of the statute"[18] by failing to properly protect community members' "right to live, work, and recreate in a clean and healthy environment." N.J.S.A. 13:1D-157. NJDEP's EJ Law rules should incorporate by reference the New Jersey Air Pollution Control Act thresholds, so that any future changes to these thresholds are automatically applied to the EJ Law. As for air pollutants like carbon dioxide, for which the threshold under the Clean Air Act or New Jersey Air Pollution Control Act is above 100 tons/year or for which no threshold is defined under those laws, NJDEP must apply the 100 tons/year threshold of the EJ Law.

b. NJDEP Should Apply the EJ Law to Facilities that Narrowly Estimate Avoidance of the "Major Source" Threshold.

In order to adequately address facilities' public health on overburdened communities, NJDEP should apply margins of safety to ensure that facilities – especially new facilities – that narrowly avoid the "major source" threshold should be subject to the EJ Law process. This would account for errors in monitoring, estimation, and reporting of air emissions.

One approach is for NJDEP to utilize a ten percent buffer for the emission thresholds. For example, a facility that estimates its PM10 emissions at 90 tons/year should be considered a "major source" for the purpose of the EJ Law, since its emissions are within 10% of the 100 tons/year PM10 threshold.[19] This approach is supported by the EJ Law, which defines "major source" facilities to include those with the "potential" to emit 100 tons of any air pollutant,[20] and requires facilities' environmental justice impact statement ("EJIS") to assess the "potential environmental and public health stressors" they may cause.[21] Given that the EJ Law requires NJDEP to account for facilities' *potential* emissions and public health impacts, applying a ten percent buffer to predicted or reported emissions for the "major source" threshold would ensure that communities are appropriately protected from errors in estimation, measurement, or

[18] *T.H. v. Div. of Developmental Disabilities*, 189 N.J. 478, 491 (2007).

[19] N.J.A.C. 7:27–22.1.

[20] N.J.S.A. 13:1D-158.

[21] N.J.S.A. 13:1D-160(3).

reporting.[22] As the EPA suggested in comments on the Newark Energy Center air permit application – which estimated PM10 and PM2.5 emissions within 4-7% of the major source threshold – assumptions about inputs such as manufacturer-specified equipment emission rates can determine whether a facility exceeds the major source threshold.[23] "Potential-to-emit" should clearly be defined as in the NJDEP Emissions Statement Guidance document: "Potential-to-Emit means the maximum aggregate capacity of a source operation or of a facility to emit an air contaminant under its physical or operational design."[24]

NJDEP should also ensure that facilities with emissions that are *not* within 10% of the emissions threshold, but nevertheless narrowly avoid "major source" thresholds because of other types of assumptions, are considered a "major source." For example, the air permit for the Aries Newark Sludge Processing Plant from August 20, 2020 estimated carbon monoxide ("CO") emissions by assuming 99.99% removal efficiency of CO emission controls.[25] If the applicant had only assumed 99% removal efficiency, then its CO emissions would be above the 100 ton/year "major source" threshold.[26] NJDEP should apply the EJ Law to these types of facilities that may be avoiding "major source" thresholds by using unusual assumptions for control efficiencies or other factors.

2. Definition of "Incinerator"

a. <u>NJDEP should define "Incinerator" Broadly and Include Facilities Combusting or Reducing Non-Hazardous Secondary Materials.</u>

To fulfill the EJ Law's purpose of protecting overburdened communities, NJDEP should interpret "incinerator" broadly. First, NJDEP should include any facilities covered by the definition of "incinerator" in N.J.A.C. 7:27–11.1, which applies to any facility that destroys or reduces "any material or substance including but not limited to refuse, rubbish, garbage, trade waste, debris or scrap or a facility for cremating human or animal remains." *Id.* This definition is "not limited to" the listed categories of waste, and NJDEP should likewise not limit the meaning

[22] *See e.g.,* Kavan Peterson, *State, EPA Environmental Monitoring Goes Online*, Pew Trusts (June 16, 2004), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2004/06/16/state-epa-environmental-monitoring-goes-online (Reporting on historic reporting "error rates of 4 percent to 10 percent" among facilities in Michigan.).

[23] Steven Riva, Chief Permitting Section Air Programs Branch, EPA, Comments on the Prevention of Significant Deterioration (PSD) and the New Source Review (NSR) Preconstruction Permit Application, Newark Energy Center Project (Apr. 17, 2012).

[24] NJDEP Division of Air Quality, Emission Statement Guidance Document 28 (Feb. 19, 2018), https://www.state.nj.us/dep/aqm/es/guide.pdf.

[25] Preconstruction Permit Application No. PCP-20-0001, Aries Newark Sludge Processing Plant (09444), at 9,41 (Aug. 20, 2020).

[26] Id.

of "incinerator" to exclude facilities that combust, destroy, or otherwise reduce other materials such as scrap tires, treated wood, sewage sludge/biosolids, wastewater, waste-derived pellets, automotive shredder residues, or fuel. NJDEP should include in the definition of "incinerator" those facilities that combust, destroy, or reduce "secondary materials," including "materials that are not the primary product of a manufacturing or commercial process, and can include post-consumer material, post-industrial material, and scrap."[27]

b. NJDEP should define "Incinerator" to Include Two-Step Incineration and Related Processes such as Pyrolysis, Gasification, Plasma Technologies, and Vitrification.

NJDEP should interpret "incinerator" to include facilities employing pyrolysis, gasification, plasma processing, vitrification, and related technologies. NJDEP has defined "incinerator" in the Air Pollution Control rules at N.J.A.C. 7:27–8.1 to include equipment using "pyrolysis." Gasification, plasma processes, and vitrification are similar processes to pyrolysis: like traditional incineration, all these waste processing methods "are thermal processes that use high temperatures to break down waste."[28] These processes emit the same pollutants as traditional incinerators, such as carbon monoxide, dioxins, sulfur dioxide, hydrogen sulfide, benzene, particulates, and chloride.[29] Based on these shared issues, the European Union's Waste Incineration Directive included "pyrolysis, gasification [and] plasma process" in the definition of "waste incineration plant."[30] Given the potential air emissions from these technologies, facilities using them have "potential public health impacts" that the EJ Law was written to address. N.J.S.A. 13:1D-158. For these reasons, NJDEP should similarly include pyrolysis, gasification, plasma processing, and vitrification facilities in its definition of "incinerator."

---

[27] U.S. EPA, *Frequent Questions about the Identification of Non-hazardous Secondary Materials that are Solid Wastes*, https://www.epa.gov/rcra/frequent-questions-about-identification-non-hazardous-secondary-materials-are-solid-wastes.

[28] Friends of the Earth, *Pyrolysis, Gasification and Plasma* (September 2009), https://reclaimpower.net/images/2016/resources/waste-to-energy-incineration/Pyrolysis,%20gasification%20and%20plasma%20-%20FoE.pdf.

[29] *Id.* (Explaining that "[a]ir emissions include acid gases, dioxins and furans, nitrogen oxides, sulphur dioxide, particulates, cadmium, mercury, lead and hydrogen sulphide."); Sue Alston et al., *Environmental Impact of Pyrolysis of Mixed WEEE Plastics Part 1: Experimental Pyrolysis Data*, 45 Env't Sci. & Tech. 9380, 9381 (2011), https://doi.org/10.1021/es201664h (Describing pyrolysis as producing waste gas composed of "42% carbon monoxide," in addition to producing sulfur dioxide and benzene.); Umberto Arena, *Process and Technological Aspects of Municipal Solid Waste Gasification. A Review*, 32 Waste Mgmt.t 625, 626 (2011), https://doi.org/10.1016/j.wasman.2011.09.025. (Describing syngas, a byproduct of gasification, which is "generally contaminated by undesired products such as particulate, tar, alkali metals, chloride and sulphide.").

[30] 2010 O.J. (L334) 17 (at Chapter 1, Article 3, Definition (40), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2010.334.01.0017.01.ENG&toc=OJ%3AL%3A2010%3A334%3ATOC).

3. Definition of "Sludge Processing Facility, Combustor, or Incinerator"

NJDEP should define a "sludge processing facility, combustor, or incinerator" to include any facility that processes sludge as defined in N.J.A.C. § 7:26-1.4. NJDEP should include all types of "sludge" as defined in those rules, including any "solid, semi-solid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant or air pollution control facility." *Id.* Additionally, NJDEP should include any facilities that process or incinerate sludge products including biosolids, biochar, and other emergent technologies for processing sludge-related byproducts. Sludge byproducts contain numerous contaminants that endanger the public health of overburdened communities through air pollution, soil contamination, and by directly causing illness.[31] According to the U.S. EPA Office of Inspector General, biosolids contain hundreds of pollutants including dozens of acutely hazardous contaminants.[32] NJDEP's definition of the "processing" of sludge should include those processes used to prepare sludge byproducts for land application, secondary processing in manufacturing applications, or other related activities using sludge byproducts.

4. Definition of "Sewage Treatment Plant"

The EJ Law defines "facility" to include any "sewage treatment plant with a capacity of more than 50 million gallons per day." N.J.S.A. 13:1D-158. NJDEP should include in the definition of "sewage treatment plant" all facilities covered as sewage "treatment works" under NJAC 7:14A-1.2. That definition includes:

> [A]ny device or system whether public or private, used in the storage, treatment, recycling, or reclamation of municipal or industrial waste of a liquid nature… and any other works including sites for the treatment process or for ultimate disposal of residues resulting from such treatment. Additionally, "treatment works" means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of pollutants, including stormwater runoff, or industrial waste in combined or separate stormwater and sanitary sewer systems.

For the purpose of the EJ Law, each component of NJDEP's "treatment works" definition should be interpreted broadly to afford proper protections to overburdened communities.

5. Definitions of "Transfer Station or Other Solid Waste Facility," "Solid Waste," and "Recycling Facility"

---

[31] *See*, *e.g.,* Tom Perkins, *Biosolids: Mix Human Waste with Toxic Chemicals, then Spread on Crops*, The Guardian, Oct. 5, 2019, https://www.theguardian.com/environment/2019/oct/05/biosolids-toxic-chemicals-pollution.

[32] U.S. EPA Office of Inspector General, EPA Unable to Assess the Impact of Hundreds of Unregulated Pollutants in Land-Applied Biosolids on Human Health and the Environment at 3 (Nov. 15, 2018), https://www.epa.gov/sites/production/files/2018-11/documents/_epaoig_20181115-19-p-0002.pdf.

The EJ Bill defines "facility" to include any "transfer station or other solid waste facility, or recycling facility intending to receive at least 100 tons of recyclable material per day." N.J.S.A. 13:1D-158.

a. NJDEP Should Define "Transfer Station" and "Other Solid Waste Facility" Broadly and to Include Intermodal Container Facilities.

NJDEP should define "transfer station" and "other solid waste facility" broadly, and should not exclude any major categories of facilities which store, process, transfer, transport, recycle or dispose of any type of solid waste. NJDEP should define "transfer station" expansively, to cover all facilities included in the definition of "transfer station" under N.J.S.A. 13:1E-3 and under N.J.A.C. § 7:26-1.4.

NJDEP should include all facilities that fall under the definition of "solid waste facility" under the Solid Waste Act found at N.J.S.A. 13:1E-3, or under the Solid Waste Rules at N.J.A.C. § 7:26-1.4. Those rules define "solid waste facility" to include "any system, site, equipment or building which is utilized for the storage, collection, processing, transfer, transportation, separation, recycling, recovering or disposal of solid waste…" N.J.A.C. § 7:26-1.4. NJDEP should include facilities which process solid waste (including waste byproducts and secondary materials) by remanufacturing or reprocessing waste to create fuel, additives, electronics, or other products. NJDEP should also include those facilities processing waste through shredding, autoclaving, de-manufacturing, biogenesis, washing, chemical treatment, dewatering, thermal depolymerization, or otherwise treating solid waste.

NJDEP should not exclude intermodal container facilities or barging facilities from the definition of "transfer station or other solid waste facility." The EJ Law stresses that overburdened communities are subjected to stressors from "numerous industrial, commercial, and governmental facilities," and made no indication that intermodal container facilities should be exempt from the meaning of "transfer station or other solid waste facility." N.J.S.A. 13:1D-157. The EJ Law explicitly applies to permits granted under the Solid Waste Management Act,[33] and that Act's definition of "solid waste" does not exclude intermodal container facilities.[34]

b. NJDEP Should Define "Solid Waste" to Include All Types of Solid Waste Without Excluding Materials Approved for Beneficial Use.

NJDEP should interpret "solid waste" to include all materials defined as "solid waste" under N.J.A.C. 7:26–1.6, including "other waste material" as defined in subsection (b) and materials

[33] N.J.S.A. 13:1D-158.

[34] N.J.S.A. 13:1E-3.

that are "disposed of" as defined in subsection (c). In N.J.A.C. 7:26–1.6(a), "solid waste" is defined as:

> [A]ny garbage, refuse, sludge, processed or unprocessed mixed construction and demolition debris, including, but not limited to, wallboard, plastic, wood, or metal, or any other waste material…

NJDEP should define "solid waste" to include any sludge byproducts or derivatives including biosolids, biomass, and biochar. NJDEP should also include all "secondary materials" including "post-consumer material, post-industrial material, and scrap" such as shredded tires and waste-derived fuel pellets.[35]

For the purpose of the EJ Law, NJDEP should not exclude "materials approved for beneficial use… pursuant to N.J.A.C. 7:26-1.7(g)" from the definition of "solid waste." As discussed in the beginning of Section II of these comments, the EJ Law provides no basis for excluding certain facilities from the definition of "facility" simply because they provide certain public benefits to the community. The Legislature intentionally created an explicit mechanism for consideration of benefits a facility may provide to the community: the "compelling public interest" analysis in N.J.S.A. 13:1D-160(c). By excluding categories of "beneficial" solid waste in its definition "transfer station" or "other solid waste facility," NJDEP would impermissibly frustrate the purpose and provisions of the EJ Law.

c. <u>"Recycling Facility" Should be Defined to Include 'Class A' Recycling Facilities.</u>

The EJ Law defines "facility" to include any "recycling facility intending to receive at least 100 tons of recyclable material per day." N.J.S.A. 13:1D-158. Under the policy and plain language of the statute, NJDEP must define "recycling facility" to include all recycling facilities, including the Class A recycling facilities that receive and process "source separated non-putrescible metal, glass, paper, plastic containers, and corrugated and other cardboard."[36] Just because Class A recycling facilities are exempt from certain NJDEP preapproval processes that apply to other types of recycling facilities[37] does not mean that these facilities would not seek other types of NJDEP permits, and thereby be covered by the EJ Law.

---

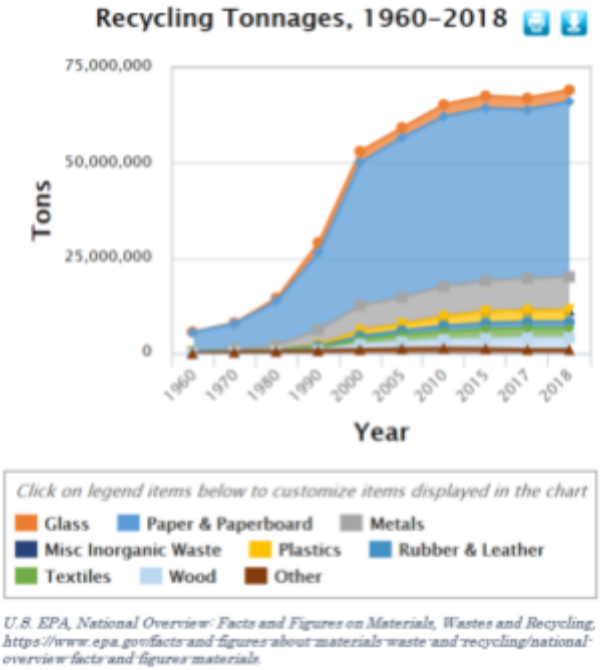
[35] U.S. EPA, *Frequent Questions about the Identification of Non-hazardous Secondary Materials that are Solid Wastes*, https://www.epa.gov/rcra/frequent-questions-about-identification-non-hazardous-secondary-materials-are-solid-wastes (Defining "non-hazardous secondary materials.").

[36] NJDEP Recycling Information, *Recycling Center and Recycling Markets Directory*, https://www.nj.gov/dep/dshw/recycling/recymkts_directory.htm (last updated Mar. 2, 2021).

[37] See N.J.A.C. 7:26A–4.1.

The materials recycled at Class A facilities are by far the most commonly recycled materials in the country (see *Figure 1* below).[38] While Class A facilities like paper recycling plants have undeniable environmental benefits, they also produce certain types of pollution such as contaminated water releases and emissions from the transportation of materials.[39] The EJ Law requires that NJDEP weigh the potential harms and potential benefits of new Class A recycling facilities on a case-by-case basis through the public EJIS process, and does not allow NJDEP to entirely exclude Class A recycling facilities from the definition of "facility."

Figure 1



U.S. EPA, National Overview: Facts and Figures on Materials, Wastes and Recycling, https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/national-overview-facts-and-figures-materials.

6. Definition of "Scrap Metal Facility"

a. "Scrap Metal Facility" Should be Defined Broadly to Incorporate Multiple Regulatory Definitions.

NJDEP should interpret "scrap metal facility" to include all types of facilities defined in N.J.A.C. 7:26–1.4, N.J.A.C. 12:58-4.4, and N.J.A.C. 7:14A–1.2, covering "scrap metal shredding facilities," "junk or scrap metal yards," and "metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards."

---

[38] U.S. EPA, *National Overview: Facts and Figures on Materials, Wastes and Recycling*, https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/national-overview-facts-and-figures-materials (last updated Jan. 28, 2021).

[39] Masanori Terasaki et al., Organic Pollutants in Paper-Recycling Process Water Discharge Areas: First Detection and Emission in Aquatic Environment, 151 Env't Pollution 53 (2007), https://doi.org/10.1016/j.envpol.2007.03.012. (Discussing surface water and surface sediment contamination from paper-recycling processes).

Under N.J.A.C. 7:26–1.4, a "scrap metal shredding facility" includes any facility which:

> 1. Receives and stores motor vehicles, appliances, other source separated, non-putrescible ferrous and non-ferrous metals;
> 2. By mechanical shredding, reduces materials listed in paragraph 1 above in volume and alters the physical characteristics of such materials; and
> 3. Transfers the ferrous and non-ferrous metals remaining after shredding of materials listed in paragraph 1 above, for reintroduction into the economic mainstream for sale or reuse.

Under N.J.A.C. 12:58-4.4, "junk or scrap metal yard" includes:

> [A]ny place where old iron, metal, paper, cordage and other refuse may be collected and deposited or both and sold or may be treated so as to be again used in some form or discarded or where automobiles or machines are demolished for the purpose of salvaging of metal or parts.

NJDEP should also include those facilities required to have a permit under NJPDES, particularly "metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards." N.J.A.C. 7:14A–1.2.

7. "Landfill" Should be Defined to Include Hazardous Waste Landfills.

The language and intent of the EJ Law require that NJDEP include hazardous waste landfills in its interpretation of the term "facility." The EJ Law applies to landfills "including, *but not limited to*, a landfill that accepts ash, construction or demolition debris, or solid waste." N.J.S. 13:1D-158 (emphasis added). This text clearly covers hazardous waste, since NJDEP regulations define hazardous waste as a subset of solid waste.[40] To exclude hazardous waste landfills from EJ Law applicability would run contrary to the Legislature's intent to reduce environmental impacts on overburdened communities,[41] and contrary to the NJDEP's hazardous waste regulations, which are to be "liberally construed to permit the Department to discharge its statutory functions." N.J.A.C. 7:26G–1.2(a).

III. PUBLIC PROCESS

At N.J.S.A. 13:1D-160(a)(3), the EJ Law specifies:

---

[40] *See* N.J.A.C. § 7:26G–5.1 (incorporating by reference 40 C.F.R. § 261.3); *Id.* § 7:26G-16.2.

[41] *See also* Martine Vrijheid, *Health Effects of Residence Near Hazardous Waste Landfill Sites: A Review of Epidemiologic Literature*, 108 Env't Health Persp. 101 (2000), https://dx.doi.org/10.1289%2Fehp.00108s1101.

The permit applicant shall publish a notice of the public hearing in at least two newspapers circulating within the overburdened community, including one local non-English language newspaper, if applicable, not less than 60 days prior to the public hearing. The permit applicant shall provide a copy of the notice to the department, and the department shall publish the notice on its Internet website and in the monthly bulletin published pursuant to section 6 of P.L.1975, c.232 (C.13:1D-34). The notice of the public hearing shall provide the date, time, and location of the public hearing, a description of the proposed new or expanded facility or existing major source, as applicable, a map indicating the location of the facility, a brief summary of the environmental justice impact statement, information on how an interested person may review a copy of the complete environmental justice impact statement, an address for the submittal of written comments to the permit applicant, and any other information deemed appropriate by the department. At least 60 days prior to the public hearing, the permit applicant shall send a copy of the notice to the department and to the governing body and the clerk of the municipality in which the overburdened community is located. The applicant shall invite the municipality to participate in the public hearing. At the public hearing, the permit applicant shall provide clear, accurate, and complete information about the proposed new or expanded facility, or existing major source, as applicable, and the potential environmental and public health stressors associated with the facility. The permit applicant shall accept written and oral comments from any interested party, and provided an opportunity for meaningful public participation at the public hearing. The permit applicant shall transcribe the public hearing and, no later than 10 days after the public hearing, submit the transcript along with any written comments received, to the department. Following the public hearing, the department shall consider the testimony presented and any written comments received, and evaluate the issuance of, or conditions to, the permit, as necessary in order to avoid or reduce the adverse environmental or public health stressors affecting the overburdened community. The department may require the applicant to consolidate the public hearing held pursuant to this paragraph with any other public hearing held or required by the department regarding the permit application, provided the public hearing meets the other requirements of this paragraph. The department shall consider a request by a permit applicant to consolidate required public hearings and, if the request is granted by the department, the consolidation shall not preclude an application from being deemed complete for review pursuant to subsection a. of this section.

It is critical that NJDEP work closely with municipalities and their staff to help translate and communicate the materials generated by the EJIS review process. One suggestion would be to offer training to key municipal staff such as the zoning officers, planning staff, environmental commission and planning and zoning boards. Also, the public process must ensure that local community groups and residents are properly notified beyond just the notification to municipal officials or the clerks. A successful public process requires investing in NJDEP's capacity to conduct community friendly outreach and then use that to ensure that industry applicants adhere to this model.

For effective and meaningful participation of EJ communities, it is important that the NJDEP staff work with the applicant to ensure that the information being disseminated prior to the public hearing with the public and local officials is clear and can be easily understood in the context of the EJ Law. Thus, we recommend that the NJDEP develop internal processes for conducting enhanced outreach along with the applicant in the public process leading up to the hearing:

- Share educational materials regarding: regulation process (orienting maps and existing conditions), Definition of Cumulative Impacts, Impact of regulated pollutants, etc. This is to help residents have a baseline understanding prior to the hearing. NJDEP should invest in public education that is accessible to make the whole process much more engaging.
- NJDEP should maintain a list of active community groups and use that list to notify them about hearings. In addition, prioritize community partnerships with the NJDEP Community Collaborative Initiative for transformative outreach & communication.
- NJDEP should ensure that the applicant provides *clear, accurate, and complete information about the proposed new or expanded facility* by reviewing all the public hearing presentation materials for accuracy and completeness prior to the meeting. Any fact sheets, presentations or other supporting materials should be reviewed by NJDEP prior.
- Email notifications need to be specific and include clarity regarding the high-level request.
- Automated phone calls or text messages, the use of social media platforms and other vehicles for communication should be considered in addition to, or instead of the newspaper ads. If newspaper ads are included, it must be newspapers with wide readership in the community where a facility is proposed. Newspaper ads should appear more than one time.
- Notification must be available in languages of the local community.
- Notification to the municipality via the clerk should also include a notification to the municipality's Environmental Commission or Municipal Green Team if such a Commission or Team is established in the host community.

- NJDEP can prepare PSAs to inform residents about the EJ law and what to look out for. To maximize the public participation process NJDEP should present a community primer explaining the implications of the law and how communities can participate as soon as the rules are finalized.
- NJDEP must require that permit applicants' notice of public hearing explicitly state whether the applicant will seek a "compelling public interest" determination from NJDEP under N.J.S.A. 13:1D-160(c). In order for community members to have a "meaningful opportunity" to participate in permitting decisions as required by the EJ Law, N.J.S.A. 13:1D-157, they must be informed whether the applicant will claim the facility will serve a "compelling public interest in the community where it is to be located." N.J.S. 13:1D-160(c). NJDEP should thus require that the "brief summary of the environmental justice impact statement" and "any other information deemed appropriate by the department" in the notice of public hearing, N.J.S. 13:1D-160(a)(3), specify whether the applicant will seek a "compelling public interest" determination from NJDEP, to properly inform the comments and engagement from affected communities. Therefore, NJDEP should require applicants to explicitly state whether they will seek a "compelling public interest" determination as part of their notice of public hearing.
- Any determination by NJDEP that a facility serves a "compelling public interest" under N.J.S.A. 13:1D-160(c) should be included in publicly-accessible records. Such records would serve the EJ Law's requirement that "the State's overburdened communities . . . *have a meaningful opportunity to participate in any decision*" to permit a facility that has the potential to increase public health stressors in those communities.[42] To enable the public participation and transparency intended by the Legislature, NJDEP must maintain a publicly accessible record, both online and in-person at applicable public libraries, of any findings of a "compelling public interest" under N.J.S.A. 13:1D-160(c).
- The EJ Law requires an EJIS to "assess the potential environmental and public health stressors" associated with the facility, and NJDEP must make clear that "potential" stressors are not limited to those stressors which "cannot be avoided if the permit is granted." N.J.S.A. 13:1D-160(a)(1).

IV. SCOPE OF "COMPELLING PUBLIC INTEREST"

The EJ Law, at N.J.S. 13:1D-160(c), states:

> [T]he department shall... deny a permit for a new facility upon a finding that approval of the permit, as proposed, would... cause or contribute to adverse cumulative environmental or public health stressors in the overburdened

[42] N.J.S.A. 13:1D-157 (emphasis added).

> community that are higher than those borne by other communities... *except that where the department determines that a new facility will serve a compelling public interest in the community where it is to be located*, the department may grant a permit that imposes conditions on the construction and operation of the facility to protect public health.

The "compelling public interest" provision of this section creates a high standard that strongly circumscribes the exceptional instances in which NJDEP may conditionally permit a new facility that contributes to higher public health stressors in overburdened communities.

1. Case Law Demonstrates that "Compelling Public Interest" is a High Standard.

The Legislature is presumed to be aware of case law applicable in its jurisdiction, and is presumed to consciously adopt particular judicial standards when its statutory language utilizes those standards.[43] So here, the Legislature knew that its use of the term "compelling public interest" in the EJ Law would incorporate the high standard that similar language has in the caselaw.[44]

The "compelling public interest" standard has been established as a high standard by federal and New Jersey courts, and is most often used to protect legal rights of the highest order. This standard (also referred to as the "compelling government interest" or "compelling state interest" standard) is a key element of the strict scrutiny test, used when considering challenges brought on the basis of certain fundamental rights.[45] The U.S. Supreme Court notes that the "compelling interest standard… is not watered down" and "really means what it says."[46] Furthermore, a New Jersey appellate court described the "compelling public interest" standard as describing a "profoundly important interest," and "not a standard to be lightly applied."[47] New Jersey courts

---

[43] *DiProspero v. Penn*, 183 N.J. 477, 494-95 (2005) (Citing multiple cases where the Legislature was held to have codified standards from case law, the Court noted: "We hardly need state that the Legislature knows how to incorporate into a new statute a standard articulated in a prior opinion of this Court.").

[44] *See id.* (The Court stated that the Legislature is presumed to have adopted the Court's "objective medical standard" by requiring "objective clinical evidence" in a provision of the Automobile Insurance Cost Reduction Act. The Court made this conclusion by comparing the language of its previous opinion ("plaintiff must show a material dispute of fact by *credible, objective medical evidence*") with similar language in the statute ("[physician's certification of threshold-vaulting injury] shall be based on and refer to *objective clinical evidence*") (emphasis in original)).

[45] *See Schundler v. Donovan*, 377 N.J. Super. 339, 347 (App. Div. 2005) (Using "compelling public interest."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993) (Using both "compelling government interest" and "compelling state interest").

[46] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (internal quotes omitted).

[47] *Schundler v. Donovan*, 377 N.J. Super. 339, 347 (App. Div. 2005) (emphasis added).

require a compelling public interest for a government to abridge weighty constitutional rights like the right to free speech.[48] By only allowing new facilities to be permitted in overburdened communities if they serve a "compelling public interest," the Legislature demonstrated that the EJ Law protects communities' weighty legal interests against experiencing disproportionate public health stressors.

Given the Legislature's adoption of the "compelling public interest" standard, NJDEP must implement the standard according to the case law that establish "compelling public interest" as a high standard. Since this is "not a standard to be lightly applied," NJDEP must avoid a broad or lenient interpretation of "compelling public interest" in its rulemaking.[49] An appropriate "compelling public interest" standard must exclude consideration of the permit applicants' economic preferences or financial convenience in complying with the EJ Law.

2. Statutory Language and Legislative Intent Require the "Compelling Public Interest" Exception to be Interpreted Narrowly.

NJDEP must interpret the "compelling public interest" exception according to the policy and legislative intent embodied in the language of the EJ Law. Interpretations of the EJ Law must avoid any interpretations that "frustrate the policy embodied in a statute." *T.H. v. Div. of Developmental Disabilities*, 189 N.J. 478, 491 (2007). The declarations of the New Jersey Legislature demonstrate an unambiguous intent to address severe, long-standing environmental injustices in overburdened communities by empowering and mandating NJDEP to rigorously implement the requirements of the EJ Law. N.J.S.A. 13:1D-157. The Legislature declared that "the legacy of siting sources of pollution in overburdened communities continues to pose a threat to the health, well-being, and economic success of the State's most vulnerable residents; and that it is past time for the State to correct this historical injustice."[50]

If NJDEP were to define "compelling public interest" broadly and regularly allow new polluting facilities in overburdened communities, it would impermissibly frustrate the policy the Legislature resoundingly declared. Furthermore, such an interpretation would render the EJ Law's rule against permitting new facilities in overburdened communities ineffective and practically meaningless. NJDEP must not interpret the EJ Law to "render any part of a statute inoperative, superfluous, or meaningless." *State v. Reynolds*, 124 N.J. 559, 564 (1991). NJDEP cannot allow the exception to swallow the rule – a lenient interpretation of "compelling public interest" would contravene the explicit language of the EJ Law.

---

[48] *See Schundler v. Donovan*, 377 N.J. Super. 339, 347 (App. Div. 2005), *aff'd*, 183 N.J. 383, 874 (2005); *Garden State Equal. v. Dow*, 216 N.J. 314, 330 (2013).

[49] *Schundler v. Donovan*, 377 N.J. Super. 339, 347 (App. Div. 2005) (emphasis added).

[50] N.J.SA. 13:1D-157.

3. The "Compelling Public Interest" Standard is Distinct from and Stricter than Waiver Provisions in Other New Jersey Environmental Laws and Regulations.

The mere fact that a facility satisfies conditions for certain waivers under other provisions does not entail that the EJ Law's more exacting "compelling public interest" standard is also satisfied. The Legislature is presumed to be aware of all pre-existing waiver provisions, but it nevertheless chose to apply a new, explicit standard for exceptions to the EJ Law. The Legislature is also presumed to have purposefully omitted any qualifications that might have otherwise been included in the statutory language.[51] The "compelling public interest" language is unprecedented among NJ environmental laws, and the Legislature used that language to imply a higher standard than the waiver or exception standards in other NJ environmental laws.[52] For example, the Highlands Water Protection and Planning Act ("HWPPA") provides for waivers "on a case-by-case basis if determined to be necessary by the department in order to protect public health and safety... [or for] redevelopment in certain previously developed areas in the preservation area... [or] in order to avoid the taking of property without just compensation."[53] Unlike the HWPPA, the "compelling public interest" language of the EJ Law does not allow for a new facility based on similar facilities previously located at the same site.

Other NJ environmental laws create explicit exceptions based on hardship, which are notably absent in the EJ Law. For example, the Freshwater Wetlands Act states that NJDEP "shall" grant waivers in certain circumstances to "avoid a substantial hardship to the applicant."[54] The Coastal Area Facility Review Act allows waivers for violations "warranted as a result of a storm, natural disaster or similar act of God."[55] The Flood Hazard Area Control Act allows for waivers "where necessary to alleviate hardship."[56]

The "compelling public interest" provision also prohibits NJDEP from waiving the requirements of the EJ Law under the Department's general waiver provisions. Those provisions at N.J.A.C.

---

[51] *DiProspero v. Penn*, 183 N.J. 477, 493 (2005) (Noting the general rule that courts are "enjoined from presuming that the Legislature intended a result different from the wording of the statute or from adding a qualification that has been omitted from the statute.").

[52] Only two other New Jersey statutes use the phrase "compelling public interest": one for public funding for gubernational primary elections (N.J.S.A. § 19:44A-27 (West 2009), and the second allowing a limit to be placed on bond for the largest tobacco manufacturers in a nation-wide, 45-state lawsuit against those companies (N.J.S.A. § 52:4D-13(a)(4)). Unlike the NJ EJ law, neither of the above statutes direct an agency to determine where a compelling public interest exists.

[53] N.J.S.A. § 13:20-33(b)(1-3).

[54] N.J.S.A. § 13:9B-18.

[55] N.J.S.A. § 13:19-5.3.

[56] N.J.S.A. § 58:16A-55(b).

7:1B allow NJDEP to prospectively waive strict compliance with NJDEP rules based on "exceptional hardship" or "excessive cost," among other things.[57] As discussed in the following section, factors such as "excessive cost" should not justify an exception under the EJ Law's "compelling public interest" standard. Given that the Legislature already provided the "compelling public interest" standard in the EJ Law, NJDEP should add the EJ Law to the list of provisions that cannot be waived under distinct standards of the NJDEP waiver provisions at N.J.A.C. 7:1B–2.1(b).

To assume that this "compelling public interest" standard is the same as NJDEP pre-existing standards would impermissibly render the "compelling public interest" provision superfluous.[58] Thus, the EJ Law's "compelling public interest" exception is not a mere proxy for the pre-existing waivers in other laws, but must instead be distinct and stronger than those other provisions.

4. A Permit Applicant's Unrealized Economic Gains do not Constitute a "Compelling Public Interest" under the EJ Law.

The Legislature's use of the "compelling public interest" standard, drawn from the strict scrutiny standard of case law, demonstrates that mere economic interests of a permit applicant cannot constitute a "compelling public interest."[59]

Courts have repeatedly and explicitly distinguished merely financial interests from genuine "compelling public interests." For instance, in *Shapiro v. Thompson* the U.S. Supreme Court held that the State's financial interest in saving costs for its public assistance programs was a "valid" interest but *not* a "compelling government interest" as required under the strict scrutiny test.[60] Furthermore, the Third Circuit Court of Appeals, which hears appeals from federal courts in New Jersey has characterized protection from environmental harms as a "compelling public interest" that is not overcome by the state's mere economic interests in the continued operation of steel facilities.[61] In the same vein, the D.C. Circuit Court of Appeals stated that there is a "compelling

[57] N.J.A.C. 7:1B-1.2; 7:1B–2.1.

[58] *State v. Reynolds*, 124 N.J. 559, 564 (1991).

[59] N.J.S.A. 13:1D-157.

[60] *Shapiro v. Thompson*, 394 U.S. 618, 627–28 (1969), overruled in part by *Edelman v. Jordan*, 415 U.S. 651 (1974) (Finding that the State's interest in preserving the fiscal integrity of its public assistance programs was not a compelling government interest as required under the strict scrutiny test.).

[61] U.S. v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077, 1088 (3d Cir. 1987)

public interest" in the enforcement of National Environmental Protection Act, regardless of "substantial additional cost" that may result from the law's enforcement.[62]

Furthermore, the Legislature already concluded that the EJ Law's environmental protections serve the "health, well-being, and economic success" of overburdened communities.[63] Therefore, to find a "compelling public interest" based on the economic interests of a polluting facility sited in an overburdened community would contradict the legislative intent present in the language of the EJ Law.

As noted above, though existing NJDEP provisions allow waivers from some regulations based on economic interests like "exceptional hardship" and "excessive cost" to the regulated entity, the Legislature purposefully departed from this standard for the EJ Law. So a "compelling public interest" must mean something different than hardship or cost to the permit applicant. And as discussed above, caselaw holds that while saving costs may be a "valid interest," it is not a "compelling governmental interest."[64] The Legislature's intentional use of the "compelling public interest" standard, and its strongly-worded legislative findings cited above, require that NJDEP excludes permit applicants' economic costs from the meaning of "compelling public interest."

5. NJDEP's Analysis of a "Compelling Public Interest in the Community" Must Consider the Facility's Impacts on Communities within at least a Three-Mile Radius of the Site.

The EJ Law states that NJDEP shall deny a permit for a new facility that causes higher adverse environmental impacts in overburdened communities, "except that where the department determines that a new facility will serve a compelling public interest *in the community where it is to be located*."[65] Based on the Legislature's express statutory intent, NJDEP's analysis must focus on whether the "overburdened communities" within the area impacted by the facility's emissions will benefit from such a "compelling public interest." Therefore, NJDEP must not interpret "community" so narrowly as to exclude contiguous overburdened communities that would be impacted by a nearby facility. For instance, a facility being proposed in any of the overburdened communities in the map below may have adverse public health impacts on dozens of overburdened communities, even though it is only physically sited within a single overburdened community. The detrimental impacts caused by a facility outside of the census

[62] *Realty Income Tr. v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977)

[63] N.J.S.A. 13:1D-157.

[64] *Shapiro*, 394 U.S. at 627–28.

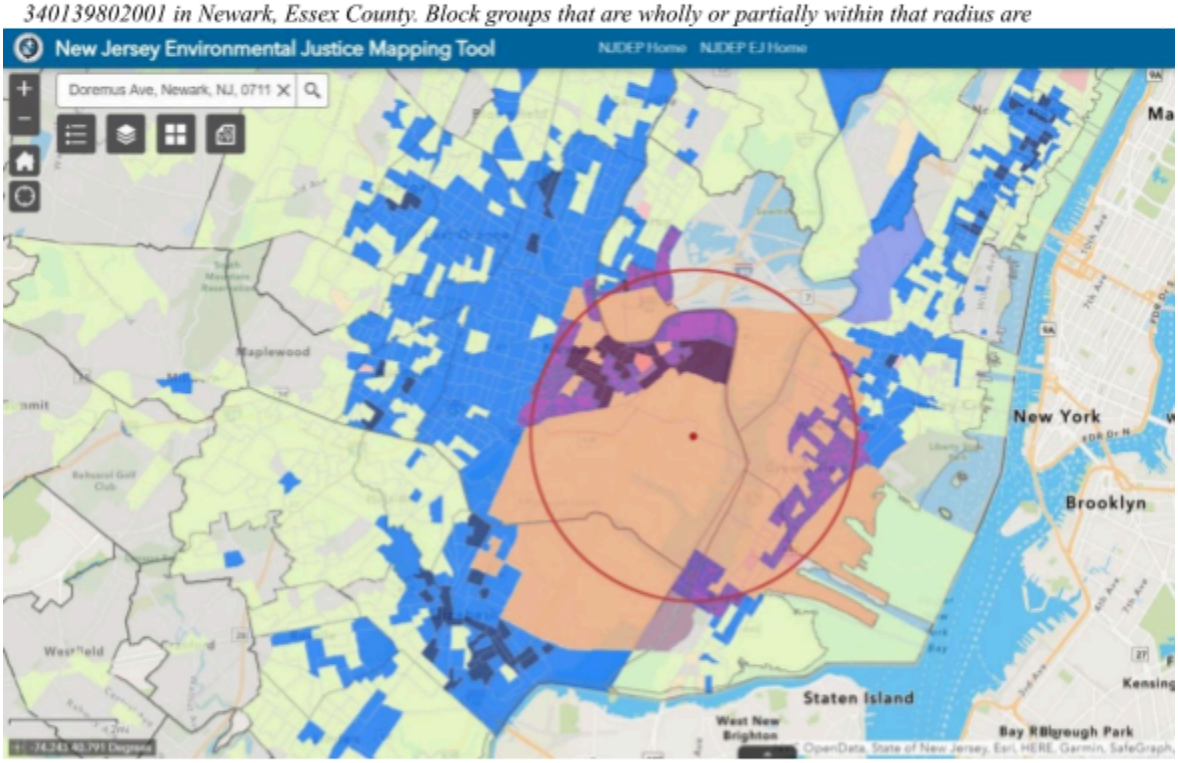
[65] N.J.S.A. § 13:1D-160(c) (emphasis added).

tract in which it is located must also be taken into account in the EJIS, and thus NJDEP must interpret "community" to ensure that impacts on those communities are not ignored in the "compelling public interest" analysis. Therefore, NJDEP's "compelling public interest" analysis should consider all "overburdened community" block groups that are wholly or partially within a geographic radius of three-mile or greater around the facility. NJDEP should not find a "compelling public interest in the community" to exist unless the facility serves the public interest of all overburdened block groups in the affected area.

The use of radius-based approach (also known as a 'concentric buffer') is supported by regulatory and scientific literature dealing with environmental justice and related regulations.[66] In its guidance on regulatory analysis for assessing environmental justice, U.S. EPA highlighted an example where a three-mile radius was used to examine the environmental justice implications of the Clean Power Plan Final Rule.[67] EPA noted that "an important co-benefit of this rule is a reduction in the adverse health impacts of air pollution on *low-income communities and*

Figure 2

A three mile radius around an example facility site located in an overburdened community, Block Group 340139802001 in Newark, Essex County. Block groups that are wholly or partially within that radius are



[66] U.S. EPA, *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* (June 2016) at 17, https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.

[67] *Id.* at C-16.

communities of color in closest proximity to power plants."[68] To understand these air quality co-benefits for those "closest" communities, "EPA conducted a proximity analysis" and found that "the percentage of the population that is minority or low-income *within 3 miles* of EGUs is greater than national averages."[69] EPA explains that in choosing parameters for a proximity-analysis, "[a]nalysts must decide what distance from the facility most accurately reflects the community's exposure to a stressor."[70] If anything, a 3-mile proximity analysis may be too conservative to capture health stressors specifically included in the EJ Law, such as cancer. N.J.S.A. 13:1D-158. For example, a recent scientific study found that people residing within 10 miles of an oil refinery were statistically significantly more likely to be diagnosed with certain types of cancer.[71]

In Section III. of these comments, we stated that NJDEP must require permit applicants to inform community members whether the applicant will seek a "compelling public interest" determination from NJDEP. The EJ Law requires permit applicants to "publish a notice of the public hearing in at least two newspapers circulating within the overburdened community, including one local non-English language newspaper, if applicable, not less than 60 days prior to the public hearing." N.J.S.A. 13:1D-160(3). For the purpose of these notice publication requirements, NJDEP should require notice to the overburdened block groups wholly or partially within a three-mile radius of the facility.

6. Any NJDEP Determination that a Facility Serves a "Compelling Public Interest" Must Only be Based on the Record Created by the EJIS and Public Hearing Process.

NJDEP should only find that a facility serves a "compelling public interest in the community where it is to be located" based on the record established by the applicant's environmental justice impact statement, the public hearing, and written comments made during the hearing process. N.J.S.A. 13:1D-160(c). The community should be notified and have the opportunity to comment on all considerations that led to a determination that is a compelling public interest exists "in the community where it is to be located." *Id.* To do otherwise would contravene the integrity of the public hearing process, by allowing permit applicants to avoid community input or scrutiny while claiming its facility serves the public interest in that same community.

[68] *Id.* (emphasis added).

[69] *Id.* (emphasis added).

[70] *Id.* at 50.

[71] Stephen Williams et al., *Proximity to Oil Refineries and Risk of Cancer: A Population-Based Analysis*, 4 JNCI Cancer Spectrum 6 (2020), https://doi.org/10.1093/jncics/pkaa088.

V. CONDITIONING PERMITS

NJDEP should adopt detailed rules that comply with the following principles when developing regulatory language for conditions added to permits, pursuant to the Environmental Justice Law. The EJ Law authorizes NJDEP to add "conditions" to a permit "as necessary in order to avoid or reduce the adverse environmental or public health stressors affecting the overburdened community." N.J.S.A. § 13:1D-160(a)(3). These conditions apply in two situations.

First, when NJDEP considers new permit applications for new facilities, NJDEP **must** deny permits for new facilities that would cause or contribute to burdens in an overburdened community, except that if NJDEP makes a finding of a "compelling public interest for the facility, "the department may grant a permit that imposes **conditions** on the construction and operation of the facility to protect public health." N.J. Stat. Ann. § 13:1D-160(c) (emphasis added). Additionally, when NJDEP considers permit renewal or modification applications for existing facilities, NJDEP 4(d) "**may** . . . apply **conditions** to a permit for the expansion of an existing facility, or the renewal of an existing facility's major source permit, concerning the construction and operation of the facility to protect public health" upon a finding that the permit as proposed would cause or contribute to burdens in an overburdened community. N.J. Stat. Ann. § 13:1D-160(d).

Specifically, NJDEP should adopt the following principles: (1) additionality, (2) specificity to directly address the stressors that adversely affect the community that the facility causes or contributes to, (3) the conditions must be adaptive, and (4) the conditions must be included in the facility's permit or otherwise enforceable.

1. Additionality

The EJ Law requires NJDEP to enforce conditions that go above and beyond conditions that the facility would already be subject to, absent the existence of the law. Permit conditions that are generally applicable or conditions that NJDEP would have applied anyway, assuming the facility was not in an overburdened community, cannot qualify as a "condition" under the law. The benefits provided under the conditions must be in addition to the requirements and conditions that facilities are subjected to.

2. Specificity to Directly Address the Facility's Own Adverse Impacts

The EJ Law states that NJDEP shall evaluate the issuance of conditions, "as necessary in order to avoid or reduce the adverse environmental or public health stressors *affecting the overburdened community*." N.J.S.A. § 13:1D-160(a)(3) (emphasis added). Permit conditions must address stressors that the facility directly causes or contributes to, rather than stressors that are unrelated to the facility's operations. For example, if a facility contributes to PM emissions in an

overburdened community, the permit conditions must directly decrease PM emissions, rather than address stressors that are not related to its operation. Examples of unrelated stressors, in this context, include park restoration programs or reforestation projects.

The EJ Law requires conditions that "avoid or reduce the adverse environmental or public health stressors affecting the overburdened community."[72] Accordingly, the conditions must reduce stressors in the overburdened community where the facility is located and in overburdened communities wholly or partially within a three-mile radius surrounding the facility, as explained in the section above. This radius will capture census blocks directly near the facility *and* those that are located slightly further away, but still within the reach of emissions.

3. Conditions must adapt to the facility's operations and address all environmental harms.

NJDEP must apply adaptive conditions, depending on the type of facility and its operations. The conditions must address all environmental harms caused by a facility, including those that are not specifically regulated by the permit. For example, when considering a scrap yard facility's application for a storm water permit, NJDEP must consider conditions that address harms broader than just those regulated by the storm water permit, such as harms to air, land, traffic, etc. Similarly, if a facility has multiple sources of emissions through a combination of mobile and stationary sources, NJDEP should apply conditions that would address pollutants emitted from *both sources*.

4. Conditions must be included in the facility's permit or otherwise enforceable.

NJDEP must ensure that all conditions are enforceable. Conditions must have the same monitoring, recordkeeping, and reporting requirements that NJDEP uses to ensure enforceability. Those conditions must be incorporated into the facility's permit. If NJDEP imposes conditions that it determines are outside the scope of the facility's permit, NJDEP must ensure those conditions are enshrined in an otherwise enforceable document, such as a consent agreement. This agreement would monitor compliance with the permit conditions and create a mechanism for enforceability.

VI. UNIT OF COMPARISON FOR EJ BLOCK GROUPS

N.J.S.A. 13:1D-160(c) states that:

> [T]he department shall… deny a permit for a new facility upon a finding that approval of the permit, as proposed, would… cause or contribute to adverse

[72] N.J.S.A. § 13:1D-160(d)

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…*

1. **Unit of comparison for EJ Impact Statement**

    a. Compare EJ Block Group to Non EJ Block Groups

Our recommendation is that the geographic unit of comparison for the EJ Block group should be the lower of the countywide or statewide average of Non EJ block groups. This ensures that the comparison of the conditions in an EJ area are fairly assessed in relation to the conditions experienced by non EJ areas. Inclusion of all block groups, whether at the county or state level, risks diluting or masking the disparate conditions across EJ vs Non EJ areas (since we know EJ areas tend to have a greater presence or concentration of stressors).

i. Use Whichever Average is Lower (More Protective) from the County or State Level Averages in Comparison to the EJ Block Group.

The flexibility to use either state or county level (non EJ) averages ensures that the comparison is reflective of different patterns of distribution of stressors across the state. For example, in northern, densely populated and industrial areas of the state, county averages of certain stressors may be higher than the state average due to the relative uniformity of distribution of the stressors across the county.

ii. Use Median (50th Percentile) Threshold

When comparing the EJ block group where the proposed facility would be located to the statewide or county (non EJ only) average for stressors - a median (50th percentile) threshold should be used to indicate when an EJ block group would be considered having cumulative environmental or public health stressors that are "higher" than in other communities. This would be a fair and reasonable interpretation of the term "higher" expressed in the legislative language since it indicates that the conditions on the block group reflect a level of stressors higher than that experienced by most non EJ areas. The Legislature's choice of "cause or contribute" language also suggests that any increase above the median threshold, no matter how slight, should trigger the EJ Law's requirements.[73] Furthermore, this is a reasonable interpretation of the bill's language since the legislature chose not to use words like "substantially higher" or "significantly higher" which would suggest something above a 50th percentile like 75th or 80th.

[73] *See Massachusetts v. EPA*, 549 U.S. 497, 523 (2007) (finding even "insignificant[]" and "marginal" increases satisfy an analogous "cause or contribute" standard in the Clean Air Act).

VII. METHODOLOGIES FOR THE EJ IMPACT STATEMENT

The recommendation for the selection of public health and environmental indicators would be to ensure there are sufficient environmental exposure, environmental burden, social vulnerability and health stressors that can reasonably be ascertained at the census block group level and that are well known to be associated with environmental justice communities. Some researchers familiar with the development of the CalEnviroScreen suggested that indicators first be grouped into three or four categories of stressors (Exposure, Burden, Climate Risk, Social Vulnerability) so they could be summed across these different categories (and potentially weighted) to produce a single cumulative impacts score for each block group. Generally, we recommend using the best available data for New Jersey for indicators in each of these categories and including the use of publicly available datasets outside of public agency purview that are consistent with a robust stressor indicator.[74] Understanding the limitations on available public health data sets, the agency may consider using public health data that is available at a sub county level that can be reasonably proportioned to the census block group level or be indicated using rates of occurrence for the health outcome.

After consultation with leading academics in the field of cumulative impacts methodologies, we recommend that the NJDEP adopt a cumulative impacts scoring approach similar to the CalEnviroScreen 3.0 methodology (draft version of the updated CalEnviroScreen 4.0 released recently)[75] to calculate relative scores for all census block groups in the state.[76] We recommend that the NJDEP adopt a similar methodological approach as the CalEnviroScreen tool to determine a cumulative impact score for each census block group in the state. This score would produce both an absolute and percentile score for each block group based on the indicators selected. The cumulative impacts score for a block group would be determined by converting the raw data for each stressor in a block group into a percentile for each stressor. The data for each stressor would also be scaled in a manner that would allow all stressors in a block group to be summed so that an overall cumulative impact score could be calculated for the block group. The scores of all non-burdened communities would then be ranked by raw score and also converted into a percentile ranking.

VIII. CONCLUSION

[74] EarthData, *Health and Air Quality Data Pathfinder (last updated Feb. 10, 2021)* https://earthdata.nasa.gov/learn/pathfinders/health-and-air-quality-data-pathfinder; Caces, University of Washington Air pollution Database https://www.caces.us/

[75] OEHHA, *Draft CalEnviroSscreen 4.0* (last updated Feb. 22, 2021) https://oehha.ca.gov/calenviroscreen/report/draft-calenviroscreen-40.

[76] Rachel Morello-Frosch et al., *Update and Statewide Expansion of the Environmental Justice Screening Method (EJSM),* Cal. Air Res. Bd., https://ww2.arb.ca.gov/sites/default/files/classic//research/apr/past/11-336.pdf.

The Legislature passed the EJ Law because "it is past time" to correct the historical environmental and public health injustices caused by siting polluting facilities in New Jersey overburdened communities. N.J.S.A. 13:1D-157. NJDEP is required to implement the EJ Law according to that fundamental legislative priority, as embodied in the statutory language and declarations of the Legislature. NJDEP must define statutory terms to include the appropriate facilities within the EJ Law's purview, while proactively supporting community engagement and limiting the ability of permit applicants to skirt the law through its "compelling public interest" provisions. In addition, NJDEP must ensure that conditions on permits are constructed to effectively protect public health, that the most protective geographic unit of comparison is applied, and that the methodology for the EJIS properly takes full account of cumulative impacts. We look forward to continued engagement with NJDEP on this matter through the stakeholder process and formal rulemaking.

Respectfully,

Ironbound Community Corporation

New Jersey Environmental Justice Alliance

Clean Water Action

Earthjustice