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VIA ELECTRONIC MAIL

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Attention: DEP Docket No. 04-22-04

Office of Legal Affairs

Department of Environmental Protection

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Trenton, NJ 08625-0402

RE: COMMENTS ON NJDEP PROPOSED NEW ENVIRONMENTAL JUSTICE RULES (DEP DOCKET NO. 04-22-04, PROPOSAL NO. PRN 2022-082)

Dear Ms. Abatemarco:

On behalf of our members, the Chemistry Council of New Jersey (CCNJ) and the Site Remediation Industry Network (SRIN) appreciate the opportunity to provide comments to the New Jersey Department of Environmental Protection (NJDEP, Department) on the Proposed New Environmental Justice (EJ) Rules published in the New Jersey Register on June 6, 2022 (Proposed Rules).

CCNJ/SRIN support the intent of New Jersey's EJ Law and member companies are committed to ensuring that all New Jersey residents are afforded the same degree of environmental, health and safety protections. However, we have significant concerns about the NJDEP's implementation process as the Proposed Rules do not sufficiently take into account the significant, and potentially avoidable, challenges that they present for businesses operating in the state. In addition, the NJDEP is proposing regulations that clearly contradict and exceed the legislative intent of the EJ Law. Though we do greatly appreciate the NJDEP's efforts, there are many significant issues with the scope and specificity of the Proposed Rules language, including concepts not aired in the stakeholder process. We urge the NJDEP to seriously consider and address the deficiencies we have identified before the rules are adopted to avoid operational impacts to existing facilities providing important services and employment to these same communities.

As an initial matter, we summarize below some of CCNJ/SRIN's key general comments and concerns with the Proposed Rules. Thereafter, CCNJ/SRIN offer more specific and detailed comments on the Proposed Rules for the Department's consideration.

CCNJ/SRIN GENERAL COMMENTS ON AND CONCERNS WITH THE PROPOSED RULES:

First, the Department has not offered the public a formal opportunity to provide feedback on its New Jersey Environmental Justice Mapping, Assessment, and Protection (EJMAP) tool, available at <https://experience.arcgis.com/experience/548632a2351b41b8a0443cfc3a9f4ef6>, and its accompanying EJMAP Technical Guidance. This is a foundational tool under the Proposed Rules that sets forth the key information required to identify overburdened communities (OBCs) by the most recent United States Census and the components of the EJ impact statement (EJIS). CCNJ/SRIN strongly urge the NJDEP to allow stakeholders to provide feedback on this information in a formal rulemaking procedure, as the tool and the Proposed Rules are inextricably linked. While we understand the NJDEP has provided technical guidance on the EJMAP, it is imperative that the regulated community and the public have up-to-date access to the data sources and clearly understands all of the environmental and public health stressors, how they interact with the identified eight (8) facility types in a given OBC, and how the NJDEP built this tool. We also recommend that the NJDEP create and share with the public a calendar schedule of when the EJMAP tool will be updated with the most recent United States Census data and environmental and public health stressors, and request clarification on when and how stakeholders will be notified of any updates. Based on our review, there are differences between the 2019 and 2020 United States Census on the EJMAP tool that indicates facilities that were not located in an OBC in 2019 were located in an OBC in 2020. This is a critical step for facilities to ensure that, at the time of any environmental permit submittal to the NJDEP, it is confirmed or not if the facility is regulated under the EJ program.

Second, the NJDEP's approach and definitions under the Proposed Rules are overly broad resulting in challenges for the most well-intentioned compliance program. For example, the EJ Law specifically authorizes the NJDEP to impose EJ requirements on facilities "located in, or proposed to be located, in whole or in part, in an overburdened community." In issuing the Proposed Rules, the NJDEP acknowledges this but unilaterally attempts to extend its authority to additional census block groups and the facilities therein *that are not OBCs*. The Proposed Rules result in over half of the area of New Jersey being deemed an OBC. This could potentially lead to severe economic consequences in the state, including a disincentive to corporate growth and innovation. Furthermore, the proposed definition of "geographic point of comparison" is overly broad. Using the 50th percentile approach, in addition to making comparisons at state/county levels and also to non-OBCs, will result in the vast majority of OBCs to be considered "higher than" for almost every stressor, which in turn will stifle economic development in the state. Undoubtedly, baseline community scores in populated areas that are situated along major transportation routes (e.g. ports, navigable waterbodies, railways, interstate) are going to fall in OBCs that score as "already subject to adverse cumulative stressors."

Third, the requirements of the EJIS present significant burdens on industrial facilities without due consideration to the benefits and investments of a particular facility to the local community. We strongly urge the NJDEP to consider and address the positive impacts that economic investment, tax base, relatively low energy costs, and job creation will have on an OBC. The NJDEP should similarly consider how to reconcile the apparent conflict between making unemployment a stressor with potential negative health consequences, while simultaneously not including the economic benefits of direct and indirect jobs and tax revenue in their review. In addition, community service and community support that companies often provide to residents living near industrial facilities, such as volunteerism, educational and workforce training programs, and grants to improve services or quality of life in the city and/or county, should also be taken into account.

Fourth, the Proposed Rules provide the NJDEP with vast discretion to deny applications for new facilities and to impose significant conditions or restraints on existing facilities. Specifically, for existing facilities,

there are no prescribed limits in the Proposed Rules on what the NJDEP can impose as conditions, both in scope and number. For new facilities that cannot avoid a disproportionate impact, consideration will be given if the facility provides a “compelling public interest.” However, this term is vaguely defined, and without further clarification, could be a very difficult standard to meet. The standard is also subjective and allows for a situation where stakeholders who have a say in the compelling public interest determination cannot reach an agreement. Moreover, the NJDEP will not allow consideration of economic benefits as justification for compelling public interest, which is arbitrary and capricious and fails to accurately and holistically consider net cumulative impacts, especially in light of the fact that “unemployment” is a listed stressor. Furthermore, for new or expanded major source facilities, the NJDEP has the ability to add Localized Impact Control Technology (LICT) and State of the Art (SOTA) standards. Importantly, however, facilities that are in this process will have likely already implemented air control technologies that have met permitting standards. This is layering on beyond compliance and can add significant cost and competitive disadvantage without justified environmental benefit. The increase in cost for compliance with the Proposed Rules, and/or the cost of upgrading facilities will likely cause many companies to move operations to new or existing facilities outside of New Jersey, or even shut down entirely.

Fifth, CCNJ/SRIN members are concerned with additional delays and cost burdens in the overall permitting process as established in the Proposed Rules. Specifically, the EJ process, including preparation of an EJIS, is going to significantly delay the NJDEP’s administrative completeness determination and, therefore, cause prejudicial delay for permit review and issuance of approvals. Critically, the Proposed Rules outline no clearly defined timeframe for when an EJIS must be submitted in the permit application process, and when the NJDEP must issue its decision (beyond stating that the decision shall not be issued until at least 45 days after the public hearing). Also, for instance, where a stressor is listed as affected, the applicant has to perform “appropriate modeling.” However, the Proposed Rules provide no standards or definitions for what is acceptable to the Department. Failure to define appropriate modeling is a deficiency which will result in not only a lack of clarity, but likely additional delays having to address questions or issues raised by the Department on the back-end of this process. It also opens up the opportunity for appropriate modeling to be challenged, and thus, further complicates the permitting process. CCNJ/SRIN urge the NJDEP to clarify what is accepted for such modeling by providing concrete, implementable guidance.

Sixth, CCNJ/SRIN strongly urge the NJDEP to recognize and incentivize through the Proposed Rules facilities that already have successful, transparent Community Advisory Panels (CAPs) and/or community engagement with community members, first responders, and elected officials. A simplified and flexible process will be more productive compared to a straight command and control mandated approach. The NJDEP should encourage successful CAPs as a robust form of community engagement by allowing CAPs that meet a defined level of engagement to be deemed an acceptable public process in lieu of public hearings.

Seventh, the Proposed Rules allow for an “interested party” to submit written and oral comments regarding an application. However, no definition on who qualifies as an “interested party” exists. This allows for anyone from outside an affected area to comment, including those with a competitive or personal interest outside of EJ or even New Jersey, to participate. Instead, the NJDEP should limit the scope of public comment to residents and individuals or organizations with an objective, defined connection to the OBC.

And finally, by way of general comment, given the scope and cost of compliance with the Proposed Rules, facilities seeking to renew a permit should be able to build upon and update the first EJIS, public process and engagement, and not need to start over for every renewal period. Subsequent evaluations should only consider increased environmental impacts that have occurred since the initial evaluation.

As indicated, aforementioned items are a summary of some of the priority concerns of our members. Notwithstanding, CCNJ/SRIN also refer to the pre-proposal comments submitted on November 23, 2020 and August 20, 2021 (both letters attached), and CCNJ/SRIN's specific comments and questions on the Proposed Rules below.

CCNJ/SRIN SPECIFIC COMMENTS ON AND CONCERNS WITH THE PROPOSED RULES:

Proposed Rules, N.J.A.C. 7:1C-1.5 Definitions

CCNJ/SRIN have specific comments and concerns with the list of definitions below:

- "Change in use";
 - "Change in use" as currently defined is vague and overbroad, particularly regarding the phrase "a change in the type of operation of an existing facility." "Change in use" should be tied to increases of emissions or the addition of a pollutant not previously permitted at the facility. CCNJ/SRIN request further clarification on the meaning of this phrase. Changes for "minor modifications" to permits should be excluded.
- "Compelling public interest";
 - The terms used to define "compelling public interest" require further clarification. In particular, with regard to the phrase "a demonstration by a proposed new facility that primarily serves an essential environmental, health, or safety need of the individuals in an overburdened community," it is unclear what the NJDEP is deeming "essential" or how high the bar is to achieve this standard. We recommend that the NJDEP defines this term drawing upon the language used in the Freshwater Wetlands Protection Act, which includes in its definition of compelling public need "that based on specific facts . . . that the public health and safety benefit from the proposed use . . .".
- "Expansion";
 - As defined, the term "expansion" is unclear, particularly with regard to the meaning of an "expansion of existing operations or footprint of development." The definition of "expansion" is also overly broad, as it appears to encompass any activity that "result[s] in an increase in stressor contributions." We recommend that the NJDEP use a clearer definition, such as a major modification as defined in the Clean Air Act. Further, "expansion" should exclude changes for which "minor modifications" to permits would be required.
 - CCNJ/SRIN also seek clarification with regard to the scenario where an existing facility with a valid approved registration or permit purchases an adjacent property for an expansion of operations; would this be considered an existing facility or an expansion?
- "Facility";
 - For clarification, the Proposed Rules should expressly exclude surface impoundments, waste piles, and land treatment units from the definition of a landfill.

- “Geographic point of comparison”;
 - As noted above, using the lower value of the state or county’s 50th percentile (non-OBCs) is too aggressive, especially in light of the fact that some of these stressors have a value of “0” (e.g. the 50th percentile for the state for railways is “0” per the NJDEP EJMAP tool, so any OBC with a railway stressor value greater than “0” would be deemed adverse). This is not a reasonable baseline for comparison. We strongly urge the NJDEP to reconsider this approach.
- “Material change”;
 - Under the NJDEP’s proposed definition of “material change”, essentially any modification to the facility or EJIS that needs to be addressed after the initial public hearing and comment period would require the facility to conduct a second public hearing due to a change in any of the four criteria in the definition. We recommend that the NJDEP narrow the focus on what is really a “material change” and thus requires a public hearing for a second time.
 - CCNJ/SRIN recommend the following edits be made to this definition:
 - “Material change” means a **major** modification of the facility or EJIS that, ~~in the determination of the Department,~~ requires further analysis or public comment to accurately assess the facility’s contribution to environmental and public health stressors in the overburdened community, such as, but not limited to: 1. A change to the basic purpose; 2. ~~An expansion of the facility;~~ 3. An increase in the potential contributions to environmental or public health stressors; or ~~3.4.~~ A change in measures proposed to address the facility’s contributions to environmental and public health stressors.
- “Net environmental benefit”;
 - The definition of net environmental benefit is described as a determination “by the Department.” However, the Proposed Rules do not identify specific standards or criteria as to how stressors and benefits will be weighted by the Department. CCNJ/SRIN seek a better understanding and more transparency of how the NJDEP will make a net environmental benefit determination to make this standard more achievable.
- “New facility”;
 - CCNJ/SRIN strongly urge removing from the definition of “new facility” the statement that the NJDEP considers a new facility an “existing facility that has operated without a valid approved registration or permit required by the Department prior to (the effective date of this chapter)...”. This statement would add significant burdens and uncertainty to companies, especially if an existing facility is unintentionally without proper permitting or registration.
 - Also, the definition for “new facility” includes “a change of use of an existing facility”, which creates confusion between what is new vs. an expansion of an existing facility. We request clarification on the meaning of “change of use” in this context.
- “Overburdened community”;
 - Stakeholders are not able to confirm that the NJDEP accurately captured all three criteria to identify an “overburdened community” or what quality controls were in place to create this list/map. CCNJ/SRIN recommend that the NJDEP make the census data that it relied upon available for review and provide explanation regarding how they identified the census block groups based on the definition.
 - Based on our review, there are differences between the 2019 and 2020 United States Census on the EJMAP tool that indicates facilities that were not located in an OBC in 2019

were located in an OBC in 2020. This is a critical step for facilities to ensure that, at the time of any environmental permit submittal to the NJDEP, it is confirmed or not if the facility is regulated under the EJ program. Similarly, CCNJ/SRIN urge the NJDEP to clarify when the designation of the census blocks could change. We understand the data is updated every two years, but it is unclear how the state legislative redistricting that occurs every 10 years will affect the EJ mapping.

- “Permit”;
 - CCNJ/SRIN request clarification of the permit exclusion as it relates to site remediation. Specifically, the definition of “permit” excludes “any authorization or approval necessary to permit a remediation” but does not explicitly exclude other permits that may be associated with a remedy (e.g. air permit, land use permit). The Proposed Rules should expressly exempt any and all permits that are specifically required for remediation activities.
 - CCNJ/SRIN also request that the NJDEP comment on the situation where an operating facility needs applicable permits while in the process of conducting remediation. We are seeking a better understanding of how the remedy may contribute to the stressors and ultimately affect the NJDEP’s review of the EJ process.
 - Moreover, regulatory projects (e.g. new fuel standards, Maximum Achievable Control Technology (MACT) standards) often result in the need for permit emission increases based on the Clean Air Act’s New Source Review rules. Yet, they are compulsory and government-mandated for environmental protection. As such, CCNJ/SRIN members are concerned that undue burdens could be imposed on facilities subjected to these standards since the term “permit” excludes “any authorization or approval required for a minor modification of a facility’s major source permit for activities or improvements that *do not increase actual or potential emissions.*”
 - The covered permits identified in the EJ Law are regulated by environmental statute and regulations with specific conditions or activities that exempt the requirements to prepare and submit an environmental permit. We request that the NJDEP confirm that all applicable permit exemptions will continue to apply, and general permits, permits-by-rule, and permits by certification are not covered permits as well.
- “Recycling or reclamation facility”;
 - We strongly urge the NJDEP to exempt all Class A recycling facilities from the definition of “recycling or reclamation facility.” These operations do not require solid waste permits as they are exempt and, therefore, they should not trigger the EJ process.
 - CCNJ/SRIN request clarification as to whether a recycling facility that is associated with upcycling materials to equal or higher value than the original item would be considered to have a greater compelling public interest than a recycling facility associated with down-cycling materials to a product that is of lower value than the original item.
- “Renewal”; and
 - The definition of “renewal” includes the following statement: “[f]or the purposes of this chapter, modifications or changes of operations that decrease or do not otherwise increase a facility’s contributions to stressors shall be permitted as a renewal.” CCNJ/SRIN request removal of this provision, as this is in direct conflict with the permit exception for “minor modification of a facility’s major source permit for activities or improvements that do not increase actual or potential emissions.” It should be irrelevant if a permit is renewed or if a facility has a minor modification so long as there is no increase of actual or potential emissions for the facility.

- “Solid waste facility”.
 - We recommend that this definition not include industrial facilities that have treatment, storage, and disposal permits to manage facility hazardous waste and are not receiving from outside facilities.

Proposed Rules, N.J.A.C. 7:1C-1.4 and Chapter Appendix, Environmental and Public Health Stressors

As we stated in our pre-proposal submissions, CCNJ/SRIN encourage the NJDEP to take into account background sources impacting a facility’s baseline when considering a concentrated area of pollution. Importantly, the requirement for a facility to evaluate cumulative impacts in an area necessitates making assumptions about the other impacts on a community from a wide variety of sources outside the control of the applicant (i.e. personal habits and behaviors of community members, transit authorities, shipping companies, etc.). In addition, the NJDEP must consider the air and water pollution in neighboring states that cause a significant increase to New Jersey’s environmental and public stressors. For example, neighboring states do not require SOTA emission reduction technology necessary to minimizing ozone producing emissions. Attainment of the Ozone National Ambient Air Quality Standards (NAAQS) continues to be a challenge in the Northeast.

The NJDEP should also consider mitigation efforts beyond the scope of a permitted facility, and efforts that are in progress, such as proposed new regulations that will improve the status of a stressor in an OBC. For instance, the United States Environmental Protection Agency (USEPA) has proposed, and claims it will finalize later this year, a Federal Implementation Plan (FIP) that will address interstate transport of ozone and requires Nitrogen Oxides (NOx) mitigations by hundreds or thousands of upwind sources to drive ozone attainment in all downwind states, including New Jersey. The USEPA has also, as part of the FIP justification, noted co-pollutant benefits, including Particulate Matter (PM) 2.5 and greenhouse gases. Where the USEPA speaks to these air quality improvements and has technical support (e.g. model results of the projected improvements), those cumulative improvements should be considered.

Looking at the list of 26 stressors, CCNJ/SRIN have serious concerns regarding the heavy reliance the NJDEP has placed on air quality stressors (i.e. two air toxics cancer risks, air toxics non-cancer risk, ground-level ozone, fine particulate matter, and permitted air sites) that result in a fair amount of redundancy. Additional stressors also appear duplicative; for instance, impervious surface and flooding stressors are similar in nature as they are a cause and effect to each other.

For the reasons that follow, CCNJ/SRIN also recommend the removal of the following stressors:

- Soil contamination deed restrictions: The Proposed Rules provide that “[w]hile soil contamination deed restrictions are protective, sites subject to such restrictions cannot be used for any purpose and, when found in abundance, reflect siting inequalities that the Act seeks to address.” This is an inaccurate statement; while facility “uses” are restricted, the overall remedy is protective to the environment and public health in accordance with the Site Remediation Reform Act and the Brownfield and Contaminated Site Remediation Act. Accordingly, identifying soil contamination deed restrictions as a stressor places additional burdens on Responsible Parties to clean up sites to an unrestricted use.
- Ground water classification exception areas/currently known extent restrictions: For similar reasons as the previous stressor, identification of ground water classification exception areas

places additional burdens on Responsible Parties to clean up ground water by active remediation rather than monitored natural attenuation.

- Permitted air sites: All sites are not created equal, and there are situations where many small sites collectively have lower emissions than one large site. In addition, there are already stressors for specific pollutants that are monitored or modeled, which are much better indicators of impacts to communities.

Regarding the first two bullets above, permits for remediation projects are exempt from the EJ process; however, these same sites with institutional/engineering controls are identified as environmental and public health stressors which the NJDEP reflect as “inequities for the OBC.” This appears to be a contradictory statement as these sites are being remediated and redeveloped into residential areas with affordable housing and/or into industrial and commercial uses for the state. Responsible Parties are converting old brownfield and industrial sites to provide growth, stability, and well-being for communities; these sites cannot be both adversely impacting and benefiting the OBC.

Moreover, given the anticipated electrification of the transportation sector that New Jersey is leading on many fronts, CCNJ/SRIN request that the NJDEP explain how mobile stressors will reflect this development and whether applicants can get “credit” for increasing use of electric vehicles.

Proposed Rules, N.J.A.C. 7:1C-2.1 Applicability

The NJDEP is not authorized by the Legislature to apply the EJ Law requirements outside of a statutorily defined OBC. Yet, the Proposed Rules seek to include certain areas that are “adjacent” to OBCs as defined in the enabling legislation.

As noted above, the EJ Law is clear that, to be subject to its requirements, a facility needs to be located in an OBC, as defined by the statute. See N.J.S.A. § 13:1D-160 (states the requirements for permit applicants under the EJ Law “if the facility *is located, or proposed to be located, in whole or in part, in an overburdened community . . .*”) (*emphasis added*).

OBCs are clearly defined by the statute:

“Overburdened community” means any census block group, as determined in accordance with the most recent United States 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.

N.J.S.A. 13:1D-158.

In issuing the Proposed Rules, the NJDEP echoes the statute in the rulemaking package:

The Department is proposing new rules to implement the provisions of New Jersey’s Environmental Justice Law, codified at N.J.S.A. 13:1D-157 et seq. (Act), and *establish the requirements for applicants seeking permits for certain pollution-generating facilities located, or proposed to be located, in overburdened communities, . . .* (*emphasis added*).

See also:

The Department's authority, pursuant to the Act, applies in circumstances where three criteria are met: (1) the proposed or existing facility is one of the eight types of facilities enumerated in the Act; (2) the applicant seeks a Department permit or approval enumerated in the Act; and (3) the facility is located or proposed to be located, in whole or in part, in an overburdened community as defined by the Act. (emphasis added).

Despite this acknowledged limitation on its own authority, the Proposed Rules purport to extend the definition of OBC of the EJ Act by proposing N.J.A.C. 7:1C-2.1e to include non-OBC Census Block Groups. However, zero population census block groups are not mentioned in the EJ Law. They are not defined in the EJ Law or the Proposed Rules. The NJDEP admits they are not OBCs as “statutorily defined,” but explains that they have decided to include them anyway:

The Department recognizes that certain census block groups may now or, as a result of census reconfiguration, have zero population. To the extent these zero population census blocks are immediately adjacent to *statutorily defined overburdened communities*, the operations of new or existing facilities in the zero population block groups have similar potential for impacts to environmental and public health stressors as those located directly in the overburdened community that would not otherwise be considered. Accordingly, the Department proposes to require an analysis of impacts of those facilities on the immediately adjacent overburdened community. (emphasis added).

The Proposed Rules deviate from the enabling legislation by withholding from the public and the stakeholder process the intent to expand the applicability of the EJ Law requirements beyond OBCs.

The EJ Law required the NJDEP to provide public notice of the census block groups that were considered OBCs, in the form of a list, within 120 days of enactment:

No later than 120 days after the effective date of this act, the department shall publish and maintain on its Internet website a list of overburdened communities in the State.

N.J.S.A. § 13:1D-159.

The NJDEP provided this list (and corresponding maps). Consistent with the statute, the list and maps identified only census block groups that met the EJ Law's required criteria. No census block groups were identified as covered because they were “adjacent.” In fact, the concept of applying the EJ Law requirements to “adjacent” census block groups was never revealed until June 2022. This is clearly inconsistent with the EJ Law's requirement for transparency, including that the list of OBCs be published within 120 days.

The extension of the EJ Law requirements to zero population census block groups is arbitrary on its face. Facilities in some census block groups immediately adjacent to OBCs would be covered by the requirements (i.e. those in zero population census block groups) and others, even if located closer to the OBC, would not be (those census block groups with any residences). No explanation is provided by the NJDEP for this distinction.

Furthermore, CCNJ/SRIN request that the NJDEP clarify the Proposed Rules' applicability to the situation

in which a facility is located in both an OBC and a populated non-OBC (i.e. not a block group with zero residents, as contemplated in § 7:1C-2.1(d)), particularly if the majority of the operations and impacts are in the non-OBC.

It is requested that the Department replace the term “complete for review” in paragraph N.J.A.C. 7:1C-2.1(c) with “administratively complete,” meaning that permit applications that have been submitted by the Department and classified as administratively complete before the effective date of the EJ regulations will not be subject to the requirements of the Proposed Rules. Retroactively subjecting applicants who have already submitted permitting applications to the EJ requirements would almost certainly create unnecessary and burdensome permitting delays.

CCNJ/SRIN also request that the NJDEP clarify the applicability of the Proposed Rules to those who completed the Administrative Order 2021-25 EJ process, received a letter from the NJDEP Office of Permit and Project Navigation, but have not been issued a permit yet.

Below are comments specifically regarding those under the Federal Energy Regulatory Commission (FERC):

- We recommend that the NJDEP review and consider the USEPA’s Promising Practices for EJ Methodologies in National Environmental Policy Act (NEPA) Reviews.
- We recommend that the NJDEP consider an exemption for projects held to FERC/NEPA standards, or at least deem federal documents submitted as part of a FERC environmental impact statement as acceptable.

Proposed Rules, N.J.A.C. 7:1C-2.2 Procedural overview

CCNJ/SRIN strongly urge the NJDEP to allow the EJ process to run concurrently with the permit renewal process. We are concerned about the onerous burden that the regulated community will have if the EJ process is required to be completed in order for a Title V renewal application to be considered administratively complete. Even with a proposed timeline for the EJ process, this requirement would create unnecessary logistical complications, unpredictability, and much longer timeframes for the Title V permitting process.

We also request confirmation that the NJDEP administrative review is the step in the EJ process that needs to be completed prior to an existing permit expiring. Moreover, the NJDEP should clarify how facilities with expired permits operating under permit shields will be treated, including whether permit shields will apply if the EJ process delays renewal submission beyond the permit expiration.

Proposed Rules, N.J.A.C. 7:1C-2.3 Initial screening information

As the Proposed Rules are written, updates to the data used in the EJMAP tool will constitute a material change and may require a resubmission of the EJIS and a new public engagement process and meeting. This can cause unreasonable delays in the permitting process for applicants who are complying with the EJ requirements and operating with good faith. CCNJ/SRIN recommend that the Proposed Rules include language that addresses using the current (i.e. as of the permit application submittal) EJMAP data. Similarly, there should be an effective date, not retroactive, when updated EJMAP outputs should be used. The Proposed Rules also do not describe the process for updating the EJMAP tool, the frequency with which it will be updated, or how the NJDEP will update the EJMAP tool once a facility reduces

environmental, health, and safety stressors in the OBC. It is similarly unclear how updates to the EJMAP tool affect nearby facilities, or new facilities that are just starting the EJ evaluation process. Furthermore, there is no indication or process set forth as to whether the NJDEP will notify municipalities when the census data blocks are updated or designation as an OBC is removed. Accordingly, CCNJ/SRIN would appreciate further clarification on the procedures for updating this tool.

Proposed Rules, Subchapter 3, Environmental Justice Impact Statement

CCNJ/SRIN are concerned that the requirements for the EJIS in the Proposed Rules are extremely subjective and unnecessarily complicated. As such, we propose that if the initial screening information for the OBC collected pursuant to N.J.A.C. 7:1C-2.3 indicates the community is not subject to a disproportionate impact of adverse environmental and public health stressors, then an applicant seeking to renew an existing permit should not be required to complete an EJIS.

In addition, the Proposed Rules do not indicate which environmental and public health stressors are to be addressed and how. There are two problems with this approach: (1) there is no specified methodology for evaluating creation or contribution of adverse cumulative stressors to determine “disproportionate impact” and (2) there is no *de minimis* threshold for what would be defined as “creating adverse cumulative stressors.” In the absence of a threshold, even the minimum amount of additional stressor(s) would result in permit denial or imposition of conditions.

Similarly, CCNJ/SRIN request clarification as to whether stressors are only evaluated for the OBC where a new or expanded facility is located or whether other affected OBCs need to be considered. For instance, the EJIS requires a description of new or expanded facilities’ traffic routes, among other information. It is unclear whether this encompasses traffic routes exclusive to the OBC in which the facility is located only, adjacent OBCs in the event of a zero population block facility location, and/or traffic routes within another OBC.

There are certain stressors, such as ground-level ozone, which cannot be easily modeled to determine the facility’s impact on the OBC. Modeling of ground-level ozone requires sophisticated and complex models that simulate the photochemical reactions of Volatile Organic Compounds (VOCs) and NO_x in the environment under different meteorological conditions. These models are used by the USEPA and state agencies and are beyond the reach of most manufacturing site environmental professionals.

Moreover, the requirement to prepare an EJIS prior to permit application review by the NJDEP could turn this into a “chicken and egg” situation, especially for new and expanded sources. It is not unusual for changes to the project design (e.g. emission control equipment, stack parameters, etc.) to be made based on NJDEP questions and comments during the permit review process. This would result in additional delays and cost burdens in the overall permitting process that could ultimately be passed on to communities that are already struggling as consumers.

Proposed Rules, N.J.A.C. 7:1C-3.3 Supplemental information

The NJDEP proposes to require supplemental information where: (1) the facility is located, or proposed to be located, in whole or in part, in an OBC that is already at the time of the permit application subject to adverse cumulative stressors; or (2) the applicant cannot demonstrate that it will avoid a disproportionate impact because it will create adverse cumulative stressors in the OBC. The all-

encompassing approach for what an applicant must submit as part of the supplemental information requirement is excessive. In many instances, the required information will be unrelated to both the subject permit application and potentially the entire facility. Rather than mandating that all information proposed at N.J.A.C. 7:1C-3.3 be provided, the list of required information pursuant to this provision should be determined on a case-by-case basis as agreed upon between the NJDEP and the applicant. In other words, the supplemental information that is required should be based on the type of facility and the facility's current or potential contribution to adverse stressors.

CCNJ/SRIN members also have the following specific questions regarding information required pursuant to N.J.A.C. 7:1C-3.3:

- For subsection (a)(1)(ii), will the New Jersey Landscape Program data be considered an approved source of known rare, threatened and/or endangered species data?
- For subsection (a)(3):
 - From what location should localized air quality data be provided from (e.g. the perimeter of the facility, on-site at the facility, within the OBC, etc.)?
 - If localized air quality data is required to be collected, concurrent site-specific weather data (e.g. wind direction, wind speed, etc.) should also be measured to assist in determining the source of any detected constituents.
- For subsection (a)(4), what source and/or method is to be used to determine “future supply capabilities” of ground water?

Proposed Rules, Subchapter 4, Process for Meaningful Public Participation

As previously noted, CCNJ/SRIN are concerned that the Proposed Rules provide no standard for what constitutes an “interested party” who would be permitted to submit oral and written comments as part of the NJDEP’s EJ review. Unless the scope of community input is limited, any third party, including competitors, could come in and intentionally create problems in the EJ review process regardless if they live outside of the impacted community or area. Public meeting participant comments should be limited to local community residents, officials and corporations.

Furthermore, the Proposed Rules do not provide a mechanism for determining applicability of public comments to the facility or permit at issue. Facilities are unable to identify comments that facilities do not impact, such as unrelated, but local traffic issues, or comments generated from other companies located at the same site or in close proximity. CCNJ/SRIN recommend that the NJDEP provide a clear and defined process for facilities to identify public comments that are not germane to the permit or facility, and not be required to respond to them and not allow the NJDEP to attach special conditions to the permit resulting from said comments.

Proposed Rules, N.J.A.C. 7:1C-4.2 Public hearing and comment

As we stated in our initial comments and our pre-proposal comments, many of our CCNJ and SRIN member companies participate in CAPs where industry, community members, first responders, and elected officials come together to communicate and be transparent with one another. CAPs are a successful way to address community concerns and share information about nearby manufacturing facilities. Accordingly, CCNJ/SRIN recommend that the NJDEP allow CAPs that meet a defined level of engagement to suffice as an acceptable public process in lieu of public hearings.

Proposed Rules, N.J.A.C. 7:1C-5.3 Compelling public interest

As set forth above, when determining whether a facility will serve a “compelling public interest” in the community, the NJDEP should allow for the consideration of overall benefits of a project, including economic benefits. This includes tax revenue and jobs, as well as community service and support such as volunteerism and grants to improve services or quality of life for those on fixed incomes. Direct and indirect jobs created in the community as a result of a facility would mitigate some of the listed stressors, including “unemployment”.

CCNJ/SRIN request clarification on how the NJDEP decides that there is a “significant degree of public interest.” Specifically, the NJDEP’s consideration of public input as to whether a compelling interest is demonstrated is subjective, and could lead to a situation where an applicant makes a strong showing that it will serve an “essential environmental, health, or safety need of the individuals in an overburdened community,” yet still not have the support of the community. The NJDEP should clarify how it will weigh these competing factors, and whether the support of the OBC is the governing factor in determining compelling public interest. Would a permit of public convenience and necessity supersede “compelling public interest”?

Proposed Rules, N.J.A.C. 7:1C-7.1 Localized impact control technology for new or expanded major source facilities

It is perhaps not the intent for the NJDEP to impose LICT/SOTA standards for new or expanded major source facilities that are so unfairly burdensome and costly as to force economic unfeasibility and arbitrarily stagnate economic development. Indeed, the emissions from stationary sources are already highly regulated on both the state and federal levels; the addition of a LICT standard would be unnecessary and arbitrary as the NJDEP air program is already addressing these air quality issues independent of the Proposed Rules.

Moreover, the NJDEP underestimates the potential costs to facilities if they implement LICT at an “expanded” major facility. If air quality related stressors are of legitimate concern to the NJDEP, there are other, more reasonable, means to address it; for example, a fence-line ambient monitoring program can be implemented at the site before the NJDEP requires that a LICT analysis be performed. These monitors can be implemented at a reasonable cost, and the data recorded by the monitors can be accessible via a cloud or Internet. If a facility can show through their monitoring that they are not adversely contributing to an adverse air stressor and would continue to do so even with the expansion, the facility should be able to move forward with the project without the need for implementing LICT or some other form of additional costly and unreasonable controls.

Proposed Rules, N.J.A.C. 7:1C-8.2 Avoidance of disproportionate impact

N.J.A.C. 7:1C-8.2 requires that any party seeking renewal of a major source permit “shall analyze and propose *all* control measures necessary to avoid facility contributions to all adverse environmental and public health stressors in the overburdened community.” (*emphasis added*). This should be revised to state “shall analyze and propose feasible control measures necessary to avoid facility contributions. . .”. In its current form, the proposed regulation is vague and ambiguous as to what control measures must be analyzed and what control measures must be proposed, which are already more specifically set forth in §§ 8.3 through 8.6. It is also made superfluous by the next sentence, which clarifies if a facility is able to avoid a disproportionate impact to all adverse stressors, the Department will be permitted to grant

the application.

Proposed Rules, N.J.A.C. 7:1C-8.4 Facility-wide risk assessment

The Department is proposing to require an applicant for a renewal permit to conduct a risk assessment for its existing source operations that emit hazardous air pollutants (HAPs). However, there are already established requirements and procedures in place to evaluate stressors which are embedded in the permit renewals and modification process. For example, the NJDEP should accept the air modeling results as required under existing regulations to meet the requirement for evaluating environmental and public health stressors under air pollution. Further, the Department should identify with specificity what risks need to be addressed that are not already identified in the criteria for when a minor modification is acceptable.

Furthermore, CCNJ/SRIN request clarification on how a facility should approach the public with a Title V facility-wide risk assessment that would not be approved by the NJDEP until the permitting process, which, as written, does not occur until after the EJ process is complete. If the EJ and permitting processes do not run concurrently, we strongly encourage the NJDEP to make it a priority to review risk assessments as efficiently as possible so they can get through the EJ process and move onto permitting.

Proposed Rules, N.J.A.C. 7:1C-8.5 Technical Feasibility Analysis

Technical feasibility analyses for additional control measures at facilities receiving their Title V renewal seem excessive when the equipment at these facilities is already highly regulated on a state and federal level. As noted in the comments related to LICT, as an alternative, facilities should at least be given the option to implement a fence-line ambient monitoring program that demonstrates that the facility renewing their Title V permit is not adversely contributing to air stressors in the OBC. If the fence-line monitoring program can demonstrate that the facility's air emissions are not adversely contributing to air stressors, the applicant should be exempt from doing the technical feasibility review.

Facilities already participating in fence-line monitoring programs in compliance with federal fence-line monitoring requirements and below federal prescribed action levels should be deemed to not adversely contribute to air stressors in the OBC.

The NJDEP can use the closest ambient monitor to the facility in the Air Now network as the geographic point of comparison during any instance where NAAQS or New Jersey Ambient Air Quality Standards (NJAAQS) for ozone or fine particulates are exceeded.

Proposed Rules, N.J.A.C. 7:1C-9.1 Department review

CCNJ/SRIN request clarification on how the NJDEP will assemble a pool of experts if they determine outside expertise is needed during their EJIS review process. It is unreasonable that the NJDEP can engage outside experts without limitation at the applicant's expense. CCNJ/SRIN also encourage the NJDEP to develop processes to ensure that outside experts have a good understanding of the industry being regulated and that a fair portion of the work goes to small and/or minority-owned businesses. Further, the applicant should have an opportunity to offer comments on contemplated experts.

Additionally, the timeline to solicit and obtain such outside expertise is also without limit and could cause unreasonable delays and costs to the applicant. In light of these concerns, CCNJ/SRIN reiterate the need

for the NJDEP to provide clarification on the anticipated timeline for the NJDEP's EJ review, and how it intends to address a situation where a permit that is being renewed expires during the EJ review process.

Proposed Rules, N.J.A.C. 7:1C-9.2 Department decision

CCNJ/SRIN strongly urge the NJDEP to not only evaluate but actually consider and address the feasibility of any additional permit conditions they plan to impose. We also respectfully request that the NJDEP allow for flexibility in the rules with their acceptance of permit conditions. For example, if an agreement on a particular mitigation and associated permit language is reached between the permit applicant and community representatives, the NJDEP should give this deference.

The Proposed Rules present a significant workload for the NJDEP, and CCNJ/SRIN members are concerned whether the NJDEP has the staffing necessary to implement this program.

Lastly, CCNJ/SRIN support the NJDEP not requiring applicable permits to go through the EJ process for a period of five (5) years following a positive final EJ decision on a permit for the same facility.

Conclusion

Finally, CCNJ/SRIN support any comments submitted separately by members of CCNJ and SRIN. In addition, we support comments submitted by the American Chemistry Council, including but not limited to its detailed review of the NJ EJ Screening Mapping Tool Stressors and associated appendix.

Thank you for your consideration of our comments on this important rulemaking effort. Again, we strongly urge the NJDEP to seriously consider and address our comments and the identified deficiencies before finalizing any rule language. If I can be of further assistance, please let me know.

Sincerely,



Dennis Hart
Executive Director

Attachments