

NJ EJ Law

Review of Submitted Comments

November 14, 2022

The comment period for New Jersey's proposed landmark environmental justice law ended on September 4th.

All told the level of response was impressive, with 1,157 pages of comments from all walks of society and across sectors. There were a few main themes in the comments that will likely help determine where the final law stands on a number of critical issues. The New Jersey Department of Environmental Protection (NJDEP) has stated that their goal is to have the final rule published by the end of this year.

What can you expect the final rule to look like? We will discuss some of the main points and issues below, which should not be construed as either legal advice or potential regulation. This is our best insight from being an active participant and one of the leading authorities on EJ in various proceedings from early 2020 to the present leading up to rule publication.

Economic benefits from permitted sites

The proposed rule is clear that economic considerations cannot play a factor in determining cumulative impact (NJAC 7:1C-1.5). However, there are numerous allusions to supplemental environmental projects (SEPs).

In this context, it is reasonable to expect historical SEPs being allowed as a means to display a site's outreach within their community.

Breadth of law

Currently only major expansions or new facilities trip the remediation aspects of this law. If this becomes final, we're ignoring the fact that there is a tangible imbalance currently between overburdened communities (OBCs) and Non-OBCs. Focusing so much on not making the problem worse doesn't target the existing imbalance.

The scope of this may expand to increase the burden on routine permit renewals.

Cumulative impacts analysis

Many commented that for a truly cumulative impact to be presented, the benefits of a project have to be considered with any potential detriments. This is a selective viewing of the concept.

The fact that local industry employs people in the area is assumed and will not be allowed as any sort of credit in the final rule.

Redundant stressors

Many commented that the stressors list was redundant with multiple stressors addressing the same underlying issue (impervious surface and lack of tree canopy) or opposing points of the same underlying issue (impervious surface and increased flooding).

It is reasonable to expect some revision in the final stressor list.

Adjacency

OBCs are considered on the census block level. Zero population blocks located adjacent to OBCs will also be considered as OBCs. Commenters suggested that this model would not allow for potential remedial actions onsite or ability to purchase parcels on adjacent zero population blocks.

Including adjacent zero population blocks would greatly expand the geographic scope of this rule. This will likely remain in the final rule but may be challenged.

Compelling Public Interest (CPI)

This is one of the most controversial points. There were numerous commenters who wanted the provision stripped from the final rule entirely, some who wanted a broad potential application, and a final group who wanted an extremely narrow reading. One should expect the latter, a narrow reading.

CPI will likely be available for critical services only, such as waste management.

EJ MAP

Many commenters felt there was inadequate opportunity to review the mapping tool and suggest potential alternatives. This is a critical component since the Tool is an essential screening step.

The DEP has stated numerous times that this is an iterative process, and they realize select tool updates will likely be required. However, the fundamentals of the tool will not be changed.

Public Notification/Community Engagement

The proposal lists numerous engagement guidelines related to a 200 ft radius from the site. Many commenters strongly urged that this radius be extended due to technical reasons such as pollutant transport potential or more subjective reasons such as community makeup.

It is highly likely that the radius will be extended.

Meaningful public engagement

Historical models have used the public comment period and public notice as baselines. If you tell a distinct group of people about your upcoming project through predetermined media, you meet the requirements. This is a thing of the past. Now sites are encouraged to look long term, develop engagement plans, and carry a relationship that lasts longer than any one project. Creativity is rewarded.

Expect more guidance on this issue in the final rule and subsequent supporting documents through the Office of Environmental Justice.

ESI staff has been advising numerous sectors on this issue since 2020. For any questions on the NJ EJ Law feel free to contact Chris Whitehead, QEP, CESM, Air Practice Leader for ESI at cwhitehead@esienv.com.