THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION IMPLEMENTS NATION'S FIRST ENVIRONMENTAL JUSTICE RULES

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US Environment, Land, and Natural Resources Alert

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On Monday 17 April 2023, the New Jersey Department of Environmental Protection (the Department) published long-awaited environmental justice rules (EJ Rules). The final EJ Rules come more than two years after Governor Murphy signed landmark environmental justice legislation (EJ Law), which along with the rules are the first in the nation aimed at reducing pollution in historically overburdened communities that the Murphy administration says have been disproportionately impacted by environmental and public health stressors.

The EJ Law applies to eight types of facilities seeking “a permit for a new facility or for the expansion of an existing facility, or any application for the renewal of an existing facility's major source permit” if the proposed facility is to be located in an area designated as an overburdened community. The eight types of facilities are: (1) major sources of air pollution; (2) resource recovery facility or incinerator; (3) sludge processing facility, combustor, or incinerator; (4) large sewage treatment plants (more than 50 million gallons per day); (5) transfer station, other solid waste facility, or recycling facility that receives 100 tons of recyclable materials per day; (6) scrap metal facilities; (7) landfills; and (8) medical waste incinerators, except for hospitals and universities. The EJ Law defines an overburdened community as “any census block group, as determined in accordance with the most recent United States Census, in which: (1) at least 35% of the households qualify as low-income households; (2) at least 40% of the residents identify as minority or members of a State recognized tribal community; or (3) at least 40% of the households have limited English proficiency.”

Under the EJ Rules, if any of the aforementioned facilities are in an overburdened community, they are required to consider community-level environmental and public health data through the Department's Environmental Justice Mapping, Assessment and Protection tool and evaluate whether the proposed facility would cause or contribute to environmental and public health stressors at disproportionate levels to those in less burdened communities. Permit applications for a new facility or for the expansion or renewal of an existing facility must include an environmental justice impact statement to assess the environmental or public health impacts that the facility could pose on an overburdened community. The applicant must also offer enhanced community engagement by holding a public hearing and opening a public comment period of at least 30 days for a permit application. The Department requires these applicants to avoid and minimize environmental and public health stressors, including through the use of added pollution control technology. If the Department concludes that there is an unavoidable disproportionate impact, it can deny an application for a new facility absent a “compelling public interest,” or apply additional controls upon an application for an expansion or renewal of an existing facility.

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In response to the Department's proposal of the EJ Rules in 2022, industry groups submitted a number of comments to address concerns with the scope and specificity of the proposed rules language, including concepts not aired in the stakeholder process or that contradict and exceed the legislative intent of the EJ Law. Notwithstanding, in implementing the final version, the Department made no substantive changes from the proposed rules. The Department, did, however, make one notable change to the concept of adjacency in an effort to clarify that facilities in a zero-population block group that are sited *immediately* adjacent (i.e., sharing a border with the overburdened community block group) to residential areas of an overburdened community will be subject to the requirements of the EJ Rules. Correspondingly, in its responses to public comments, the Department explained that it is not its intent to require a facility located in the far corner of a zero-population block group, removed and buffered from an adjacent residential community, to be subject to the rules, nor is it intending to expand the definition of overburdened communities beyond what is set forth in the EJ Law.

The rules took effect immediately upon being issued and present significant legal and regulatory challenges to businesses and industries across the state. As the first rules of its kind, we can expect the rest of the nation to pay close attention as New Jersey's EJ Law is fully implemented. Lawyers and policy professionals at K&L Gates are actively engaged in these issues and can provide assistance to clients on this significant development.

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