

NEW JERSEY'S EJ LAW SIGNALS WAVE OF **POLICY CHANGES THAT WILL IMPACT OUR INDUSTRY**

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New Jersey's Landmark Environmental Justice Legislation, Biden Agenda Set the Stage for a Sea Change

There is no doubt that 2020 was a transformative year. The COVID-19 pandemic disrupted lives, led to unprecedented public health measures, and contributed to political, economic, and social turmoil across the United States. Another outcome was a renewed focus on disparities experienced by people of color and people in low-income communities, who are more likely to live in polluted areas, confront climate change-related events like flooding and droughts, and [suffer from chronic health conditions like asthma and diabetes](#). Environmental justice concerns are now front and center.

Why Environmental Justice Is a Force of Change

For a variety of reasons, many disadvantaged communities face disproportionate exposure to industrial and commercial pollutants. Such injustice can happen when government policies don't holistically consider how facilities and other development projects can magnify existing environmental and public health challenges in a specific area.

According to the [Environmental Protection Agency \(EPA\)](#), environmental justice can only be achieved when all people – regardless of race, color, national origin, or income – are treated fairly in policy decisions affecting public health and the environment in their communities, and when all people have an equal opportunity to participate in the decision-making process.

New Jersey's Game-Changing EJ Legislation

State and local governments increasingly are making environmental justice a legislative priority. President Biden also has made [environmental justice a federal priority](#).

But perhaps the most striking example of government leadership on EJ issues is in New Jersey. On Sept. 18, 2020, New Jersey Gov. Phil Murphy (D), signed [landmark legislation](#) that imposes strict environmental justice requirements on companies looking to build or expand certain factories, power plants, and other facilities that produce significant pollution in overburdened communities. The requirements also apply to a narrow range of permit renewals involving facilities with Title V Air Permits (which are issued to facilities that have air emissions above specified, significant thresholds).

“The New Jersey statute is the **FIRST OF ITS KIND IN THE NATION** with real teeth”

How New Jersey Is Different

While every state in the country has some kind of environmental justice policy, the New Jersey statute is the first of its kind in the nation with real teeth. For new facilities, the New Jersey Department of Environmental Protection (NJDEP) must deny new permits if it determines the new facility would “cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities.” However, if there is a compelling public interest, NJDEP may grant the permit after imposing additional conditions. If a disproportionate impact is found for existing facilities, NJDEP cannot deny the permit but may impose additional conditions that mitigate the impact.

New Environmental Due Diligence Considerations

NJDEP is currently drafting regulations that would implement the new law, so the specific requirements and thresholds are not yet known. [Stakeholder meetings are ongoing](#) and proposed regulations are anticipated to be out for public comment this fall. However, what we do know is that under the new framework, applicants seeking a permit for certain facilities (new or expansions of current facilities) within “overburdened communities” will have to submit an environmental justice impact statement (EJIS) and hold public hearings as part of their permit application process. As such, consultants overseeing the environmental due diligence process for projects involving regulated facilities will need to first determine whether the facility is located in an overburdened community, and if so, they will need to conduct and include an environmental justice assessment of the facility’s probable cumulative impacts on the surrounding population.

REGULATED FACILITIES

Permitted facilities subject to these requirements include:

- Major sources of air pollution (i.e., gas-fired power plants and cogeneration facilities, or other facilities with a Title V Air Permit);
- Resource recovery facilities or incinerators;
- Sludge processing facilities;
- Sewage treatment plants with a capacity of more than 50 million gallons per day;
- Transfer stations or solid waste facilities;
- Recycling facilities that receive at least 100 tons of recyclable material per day;
- Scrap metal facilities;
- Landfills; or
- Medical waste incinerators (excluding those connected to hospitals and universities).

What Is an Overburdened Community?

Under the law, an “overburdened community” is defined as any community where 35 percent of the households qualify as low-income according to the U.S. Census, 40 percent of households are minority, or 40 percent of households have limited English proficiency. New Jersey has identified 311 municipalities that have overburdened communities. [The state also has released maps of these areas, as well as an Environmental Justice Mapping Tool](#) allowing users to see if a facility or property falls within the boundaries.

EJ Impact Assessment, Potential for Permit Denials

Specifically, the environmental justice impact statement (EJIS) must “assess the potential environmental and public health stressors associated with the proposed new or expanded facility, . . . including any adverse environmental or public health stressors that cannot be avoided if the permit is granted, and the environmental or public health stressors already borne by the overburdened community as a result of existing conditions located in or affecting the overburdened community.”

“Under the new law, permit applications that do not include EJIS... **WILL BE REJECTED**”

Under the new law, permit applications that do not include EJIS, which again, must consider cumulative impacts of the facility on the community, will be rejected. Importantly, NJDEP must also deny permits for facilities that disproportionately impact overburdened communities. There are certain exemptions that allow permits to be issued if the NJDEP determines the facility would serve a “compelling public interest” in the community where it would be located, but these exceptions appear to be narrow.

Disproportionate Impact Analysis TBD

The disproportionate impact analysis, the basis of New Jersey’s law, involves comparing the host community to another community. New Jersey’s law directs NJDEP to compare the impacts on the host community to “those borne by other communities within the State, county or other geographic unit of comparison,” but it does not include additional guidance. This analysis is critical to the overall EJIS assessment and ultimate outcome for approval or denial of the requested permit.

[Matthew Karmel](#), a NJ lawyer in the Environmental Law Group at Riker Danzig Scherer Hyland & Perretti, is regularly involved in permitting large facilities and has been participating in the stakeholder meetings relating to the new law. He recapped information from a recent meeting on disproportionate impact analysis considerations, explaining that NJDEP representatives discussed several approaches for determining the appropriate geographic unit of comparison through a statistical approach based on widespread impacts.

Using air pollution as an example, he noted that one approach considered whether the host community had more air pollution than a specified percentage (either 50% or 80% in the examples provided) of other communities within the state. Another compared the host community statistically to other communities within the same county. Yet another approach compared the host community to communities within the same county as well as the state.

A Bright-Line Test for Impact?

“Each of these approaches involves certain priorities and trade-offs,” Karmel explained. “In the end, the NJDEP representatives said they would select one of these approaches to be applied uniformly across all sites and impacts, which would provide additional certainty to the process but would curtail the ability of permittees and communities to identify case-specific factors.” In other words, NJDEP seems to be moving toward creating a bright-line test as to when a facility contributes to a disproportionate impact, and that means that permittees and communities may not have any ability to argue for or against a disproportionate impact in a close case.

Critical considerations that will be key to the outcome, Karmel says, are: What are the impacts that get measured? What are the data sets used to measure these impacts? How much flexibility will permittees and communities have to contextualize the impacts?

“NJDEP seems to be moving toward **CREATING A BRIGHT-LINE TEST** as to when a facility contributes to a **DISPROPORTIONATE IMPACT**”

Momentum Building on the Heels of NJ’s Law

Although more than a dozen states, including New York and California, also incorporate cumulative impact assessments into the permitting process, their state regulators have more discretion in this area. That’s why, according to a [recent article](#), experts claim those provisions “lack teeth.” For example, [New York law](#) says that state agencies “shall not disproportionately burden disadvantaged communities” in issuing permits and “shall also prioritize reductions of greenhouse gas emissions and co-pollutants” in those communities. But unlike in New Jersey, New York does not require denials of permits that do disproportionately burden disadvantaged communities, although newly proposed legislation could change this (*See sidebar*). Similarly, [California law](#) requires local governments to consider environmental justice issues in zoning decisions, but it doesn’t mandate permit denials in cases where disadvantaged communities are negatively impacted. However, pending legislation would make that change. (*See sidebar discussion*). Taken in context with President Biden’s aggressive environmental justice agenda, the momentum is building for more states to tackle environmental justice issues. (*See sidebar discussion*).

TRACKING STATE EJ LEGISLATION

In addition to New Jersey, many other states have also been active on environmental justice issues. Some selected legislative developments are highlighted below.

California

[Pending legislation](#) would require state permitting agencies to deny applications that would adversely contribute to cumulative environmental stressors in overburdened communities.



Connecticut

A new [law](#) requires property developers to mitigate the environmental impact on the surrounding community. [Proposed legislation](#) would establish an environmental equity working group to create criteria for identifying disadvantaged communities burdened by environmental pollution and other health hazards. The goal would be to reduce greenhouse gas emissions in those areas and to amend the state’s EJ statute to enable disapproval of facility and permit applications when harmful to the environment and/or public health.



Georgia

[Pending legislation](#) would create an [Environmental Justice Commission](#) that could intervene in state agency proceedings related to environmental issues affecting people of color and people from low-income families. The bill would also require consideration of EJ issues before granting certain development permits.



Maryland

On March 12, the Senate approved the [Climate Solutions Now Act](#), which directs state agencies to identify communities disproportionately affected by climate change and to ensure that those communities receive equitable mitigation funding.



Biden Priorities: Climate and EJ

President Biden's [Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis](#) (Jan. 20, 2021) makes clear his administration's intent to prioritize environmental justice, including holding accountable polluters "who disproportionately harm communities of color and low-income communities." Under this order, all executive departments and agencies must review and address agency action from the last four years that conflicts with the order's EJ priorities. In addition, agencies must accurately account for the full cost of greenhouse gas emissions before taking action that may increase emissions. This accounting includes social costs, such as damage to human health and property damage from increased flood risk.

“Biden's Executive Order makes clear his administration's intent to **PRIORITIZE ENVIRONMENTAL JUSTICE**”

Congressional Democrats are prioritizing legislative action on EJ issues. The House Committee on Energy & Commerce recently introduced the [CLEAN Future Act](#), comprehensive (and unprecedented) legislation to combat climate change. In addition to policy provisions aimed at reducing greenhouse gas emissions and transitioning to a cleaner, more sustainable economy, [the bill](#) dedicates a full title (Title VI) to EJ, significantly building upon previous policy efforts. Among other things, the legislation would:

- Restrict air pollution permits from being issued or renewed for major sources in census tracts already overburdened by pollution.
- Set a 10-year deadline for the cleanup of all federal Superfund sites that are vulnerable to the effects of climate change.
- Require significant expansion of air quality monitoring for toxic air pollutants in fenceline communities, a rapid expansion of the national ambient air monitoring network in overburdened communities, and increased community access to information about air quality.

Congressional Democrats also reintroduced the [Environmental Justice for All Act](#), which, among other things, would require federal agencies to consider cumulative impacts when making permitting decisions under the Clean Air Act and Clean Water Act as well as consider input from communities of color disproportionately impacted by pollution before making permitting decisions under the National Environmental Policy Act.

Massachusetts



On [March 26](#), Gov. Charlie Baker signed [new legislation](#) that sets aggressive greenhouse gas reduction targets and addresses environmental justice issues. The new law requires the state to consider the cumulative impacts of development – how a proposed project would add to the existing environmental harms in that community. The state also must improve the public participation process.

Minnesota



[Pending legislation](#) says that the state Pollution Control Agency can't issue permits without analyzing the demographic, social, and economic characteristics of the population exposed to the facility's emissions.

New York



[Current law](#) says that state agencies can't disproportionately burden disadvantaged communities in issuing permits. [Pending legislation](#) would bring that provision on par with New Jersey law by prohibiting approval of development projects when they disproportionately harm those communities.

Oregon



[Proposed legislation](#) would revise the state's land-use law, requiring officials to consider the cumulative impact on neighborhoods overburdened by pollution before granting development permits. It would also require local governments to map EJ communities and quantify the cumulative health risks they've experienced.

Rhode Island



On March 16, the Senate passed the [2021 Act on Climate](#), which calls for the inclusion of environmental justice communities in its plans to reduce greenhouse gas emissions.

Current as of 4/16/21

In addition, President Biden's [\\$2.25 trillion infrastructure proposal](#) provides unprecedented funding for EJ-related priorities. The plan specifically earmarks \$20 billion for a program designed to advance racial equity and EJ in neighborhoods historically cut off from such investments, [with billions more designated for numerous infrastructure improvements](#) that would benefit low-income communities.

Although the future of these legislative and funding proposals are uncertain, it is clear that the advancement of EJ policy will remain a priority under Biden. If action on the federal level does not move forward, we can expect the states to continue their efforts to strengthen EJ protections for disadvantaged communities.

Final Thoughts: Practical Considerations for Environmental Consultants

Policy actions related to environmental justice are moving at a rapid pace. Going forward, it will be critical to track legislative developments related to EJ on both the state and federal levels. Meanwhile, if you own facilities or work on industrial or manufacturing projects in New Jersey, it is important to plan ahead for the new EJIS process before regulations are finalized.

Here are some things to consider in anticipation of the forthcoming changes in New Jersey:

- Identify (now) any existing or proposed facilities that fall within the boundaries of "overburdened communities" in New Jersey. This should routinely be incorporated into due diligence and project planning going forward.
- Factor into planning the EJIS review timeline for regulated facilities, which will be a minimum of 105 days. This includes a 60-day public notice requirement and then 45 days before the DEP can issue a decision. If there is a challenge to the decision, it will take longer.

Although the state is "committed to streamlining the process," Karmel reminds everyone that "things take as long as they take."

- Consider potential mitigation and/or conditions. If your facility is likely to contribute to a disproportionate impact, you may be required to make changes to construction and/or operational practices in order to mitigate the impacts. While the scope and nature of these conditions are not yet known, there are certain legal and practical limits. As Karmel notes, "there is case law at the federal level on appropriate permit conditions, and aspects of the NJ law may serve to guide appropriate conditions."
- Be ready for data collection and analysis. The EJIS will be a data-driven process that will involve a three-tiered data review, which will include the data on the environmental impacts of the project, data on the host community, and data on the comparison community.

*"The EJIS will be a **DATA-DRIVEN PROCESS** that will involve a three-tiered data review"*

- Pay attention to potential impacts on financing. Although it is not yet known if there will be impacts or additional burdens on lending, it will be important to lenders that the process affords enough certainty to identify and manage any potential financing risks.
- Keep an eye out for the proposed regulations, which New Jersey has committed to getting out before the end of the year, with a possible effective date in mid-2022. They could also be out as early as this summer. Be prepared to carefully review the draft regulations and submit written comments, if relevant, to ensure that your input and potential concerns are considered.



UPCOMING PODCAST ON ENVIRONMENTAL JUSTICE

ERIS will be hosting a podcast on environmental justice and New Jersey's new law in May. It will feature Matthew Karmel, an environmental attorney from Riker Danzig Scherer Hyland & Perretti LLP, who is participating in the New Jersey stakeholder meetings and closely tracking the proposed regulations as well as the potential impacts of the new EJ law on the regulated community. Keep an eye out for more details!

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