



# Environmental Justice Initiatives Soon May Impact Permitting and Other Regulatory Actions

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Since taking office last year, New Jersey Governor Phil Murphy has sought to place concerns about environmental justice in the foreground of New Jersey's regulatory decision-making process. Advocates and policymakers long have maintained that locally undesirable or polluting land uses disproportionately are located in low-income, typically urban communities that lack political influence or sufficient resources to protect their interests. Environmental justice efforts attempt to respond to this imbalance and, as the NJDEP defines the concept, aspires that "no one group of people will have a disproportionate share of negative environmental consequences stemming from industrial, governmental and commercial operations or policies." Recently, both the executive and legislative branches have taken steps to implement new environmental justice policies. Last year, Governor Murphy issued an Executive Order and NJDEP distributed a draft guidance document that instruct State agencies to account for environmental justice concerns in their decision-making processes. In addition, S1700, a bill imposing additional environmental permitting requirements in certain "burdened communities," was unanimously reported out of the Senate Environment and Energy Committee in February.

The Murphy administration took its first steps toward addressing environmental justice concerns with Executive Order 23, issued in April 2018, which directed NJDEP to develop a guidance document providing direction for all executive agencies to take environmental justice into account in their decision-making. NJDEP published its draft guidance in December 2018 in response to the E.O. 23 directive. In its current form, the draft guidance directs fifteen State agencies to prepare Environmental Justice Action Plans that would focus on internal training of agency employees and provide the public with greater opportunities to participate in agency decisions that impact environmental justice communities. A new interagency working group would develop solutions to the exposure of

underprivileged communities to lead in paint and drinking water and would study ways in which those communities are vulnerable to climate change. In short, the environmental justice draft guidance is heavy on interagency cooperation and public participation, but does not impose new requirements on regulated entities.

On the other hand, S1700, the environmental justice bill currently before the legislature, if passed, would impose stringent requirements on some regulated entities. This bill has been introduced in several successive Legislative sessions in the last decade, but always died in committee; however, the current administration, as noted, has put its influence behind environmental justice efforts. As modified in the Senate Energy and Environment Committee before being reported to the Senate Budget and Appropriations Committee on January 24th, S1700 requires NJDEP to designate census tracts ranked in the bottom third of tracts in the state for household median income as “burdened communities.” Before NJDEP could issue a permit to build or expand certain facilities located in burdened communities, including electric generating facilities, sewage treatment plants, solid waste transfer stations or recycling centers, or landfills, S1700 would erect several new procedural barriers: (1) the applicant must prepare an environmental impact statement and hold a public hearing in the burdened community; (2) NJDEP can deny a permit application that otherwise meets all other requirements if the cumulative health and environmental effects of the permitted activity, combined with existing environmental conditions, would constitute an “unreasonable risk” to the burdened community; and (3) NJDEP must consider the community support for or opposition to the project before issuing the permit. However, the Senate Energy and Environment Committee made the bill less burdensome than the initial draft; for example, the committee limited the types of facilities to which S1700 would apply, and it removed a requirement that the municipal governing body separately approve permits for facilities in burdened communities.

Notwithstanding these committee changes, S1700 still would make siting or expanding covered facilities more onerous than it is under existing law. An existing facility located in an area designated as a burdened community could find that its ability to expand is severely constrained. The somewhat vague term “unreasonable risk” (to be further defined by NJDEP through promulgation of rules and guidance) also invites litigation over NJDEP’s permit decisions in burdened communities. It should be noted, however, that the bill’s permissive language—NJDEP “may deny a permit application”—could make it difficult to challenge NJDEP’s exercise of discretion to deny a permit on environmental justice grounds or to grant a permit despite environmental justice concerns. The scope of NJDEP’s obligation to “consider” community support or opposition to the permit is unclear. Would the agency have acted in error if it “considers” near unanimous community opposition to a permit, but grants the permit nonetheless?

Interested parties should closely follow and consider participating in these ongoing efforts to implement environmental justice principles. The Legislature’s effort to inject environmental justice principles—usually reserved for the rarefied precincts of inter-agency discussion groups—into the everyday work of issuing permits for facilities could change the course of development in New Jersey.

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