



August 20, 2021

VIA ELECTRONIC MAIL

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New Jersey Department of Environmental Protection

RE: CCNJ/SRIN PRE-PROPOSAL COMMENTS ON NJDEP ENVIRONMENTAL JUSTICE RULEMAKING STAKEHOLDER EFFORT

To Deputy Commissioner Glenn and Deputy Commissioner Moriarty –

On behalf of our members, the Chemistry Council of New Jersey (CCNJ) and Site Remediation Industry Network (SRIN) appreciate the opportunity to provide the following comments to the New Jersey Department of Environmental Protection (NJDEP, the Department) on the Environmental Justice (EJ) rulemaking focus areas, as presented at the virtual stakeholder meetings held from January through June 2021. We would like to thank the NJDEP for engaging with stakeholders prior to drafting and publishing a final EJ rule proposal. Please note that these comments are limited based on what information had been shared during these meetings. Though CCNJ/SRIN plan to participate in the public comment period once a formal rule proposal is published in the New Jersey Register, we strongly urge the NJDEP to seriously consider these pre-proposal comments before finalizing any rule language.

CCNJ/SRIN support the fair treatment and meaningful involvement from all of our community stakeholders. As such, we support the goals of the EJ legislative and regulatory process. However, as we stated in our initial comments submitted on November 23, 2020 (attached), we encourage the NJDEP to provide balance to the implementation process that both achieves the goals of the legislation and provides flexibility in the permitting process so that businesses can continue to operate, expand, modernize, remain competitive, and bring benefits to the residents of New Jersey while meeting the NJDEP's permitting requirements.

Below are CCNJ/SRIN's pre-proposal comments on the information presented by the NJDEP during the EJ rulemaking stakeholder effort, with the concluding meeting held on June 24, 2021:

Facility & Permit Definitions and Triggers

CCNJ/SRIN requests that the NJDEP confirm that a covered facility/applicable permit would not be subject to the EJ process if the activity in the mapped overburdened community does not result in a material net increase in environmental or public health stressors. We recommend that only significant permit changes that result in a material net increase in an environmental stressor(s) require the EJ

process. Also, we recommend that the NJDEP establish clear EJ-specific regulatory criteria for a facility to be required to prepare an EJ Impact Statement (EJIS) with clear de minimis thresholds, as well as for permit applicability (e.g. Title V amendment vs. Title V significant modification).

The covered permits identified in the EJ law are regulated by environmental statute and regulations. There are specific conditions or activities that exempt the requirements to prepare and submit an environmental permit in these environmental statute and regulations. We request that all identified permit exemptions continue to apply. Based on our review, we have identified the permit exemptions to include, but may not be limited to, the following: all solid waste and recycling exemption activities cited in N.J.A.C. 7:26-1.1 and 7:26A-1.1, water supply allocation permit exemption cited in N.J.A.C. 7:19-1.4, New Jersey Pollutant Discharge Elimination System (NJPDES; N.J.A.C. 7:14A-2.5), Coastal Area Facility Review Act (CAFRA; N.J.A.C. 7:7-2.2(c) through (f)), and the Waterfront Development Law set forth at N.J.A.C. 7:7-2.4(d), (f), and (h). In addition, we urge the NJDEP to exempt all Class A recycling facilities. These operations do not require solid waste permits as they are statutorily/regulatorily exempt and, therefore, they should not trigger the EJ process.

Also, to avoid unnecessary burden for the communities, the NJDEP, and regulated community, CCNJ/SRIN recommend that the EJ process for future Title V renewals should initiate from the first EJIS, public process and engagement, and not start over every 5 years. After completing the evaluations for the first Title V renewal that triggers the EJ process for a given facility, subsequent evaluations for the same facility should only consider increased potential environmental impacts that have occurred since that first evaluation.

In addition, considerations should be made when multiple environmental permits are renewed on different timelines (e.g. Title V permit renewal due January 2022 and NJPDES permit expires January 2023) so that the previous EJIS can be updated and incorporate any modifications that were made to reduce stressors. This will be time-consuming to the facility and the public to conduct and review an EJIS for each permit that is expiring or other EJIS triggering event. There must be some ability to receive credit or provide an off-ramp to re-assess the EJIS every time a permit is expiring within a two-year window.

CCNJ/SRIN suggest that the NJDEP consider alternatives to the EJ process frequency for large facilities with multiple environmental permits and programs. The statute covers a multitude of statutes that trigger the EJ process. Large industrial facilities are responsible for obtaining a number of different permits under these statutes, and a separate EJ process for each individual permit could overwhelm both NJDEP and facility resources, as well as the public review process.

CCNJ/SRIN support the NJDEP's statement that general permits, permits-by-rule, and site remediation permits are exempt from the EJ process at the June 2021 stakeholder meeting.

Geographic Points of Comparison

The New Jersey EJ law defines "overburdened community" as 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. 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 2018 census data available for review and provide explanation regarding how they identified the census block groups based on the definition as part of upcoming rule proposal.

Similarly, the process for comparing overburdened communities to other (i.e. non-overburdened) communities using state and county data is a confusing, complicated, data-intensive process that requires further stakeholder review and input to better understand the potential outcomes and appropriate use of data sets before NJDEP puts this procedure into use.

Further, CCNJ/SRIN are concerned that this same lack of transparency may occur in the NJDEP unilaterally designating the geographic point of comparison. It is unclear how the NJDEP intends to determine the applicable point of comparison. CCNJ/SRIN want to ensure that the nuances of each project are considered when determining the geographic point of comparison. What's more, if an applicant disagrees or objects to the prescribed comparison location, it is unclear whether there will be an opportunity to lodge this objection or advocate for a more appropriate comparison point.

CCNJ/SRIN support an appropriate geographic unit that is fair and equitable to determine the adverse environmental and public health stressors. As such, the NJDEP should allow flexibility for the applicant to select its own comparison area since situations will vary with one level of geographic reference not being suitable for all circumstances. In addition, we support the NJDEP's statement that all environmental and public health stressor data will be made publicly available.

The New Jersey EJ law gives the NJDEP latitude to establish what constitutes "higher than those borne by other communities". As noted on slides 34 – 36 presented during the NJDEP's June 24, 2021 EJ rulemaking stakeholder meeting, the Department suggests that the rule proposal will establish 50th percentile as "higher than" vs. the United States Environmental Protection Agency (USEPA)'s 80th percentile. Using this approach, in addition to making comparisons at state/county levels and also to non-overburdened communities, is too aggressive and results in a situation where the vast majority of overburdened communities will be considered "higher than" for almost every stressor. The illustration on the aforementioned slides 34 – 36 results in 90% of overburdened communities being classified as "higher than". If this is compounded with nearly twice as many environmental and public health stressors (further discussed below) as the USEPA, it results in a stifling environment for economic development in the state.

Environmental & Public Health Stressors

As we stated in our initial comments submitted on November 23, 2020, CCNJ/SRIN encourage the NJDEP to take into account background sources impacting a facility's baseline when considering a concentrated area of air pollution, such as ozone and particulate air pollution transport from upwind states. The NJDEP's Division of Air Quality already has a network of Air Monitoring Stations that should be used to establish this baseline.

Focusing on air quality and Hazardous Air Pollutants (HAPs), an established requirement and process are in place to evaluate stressors which are embedded in the permit renewals and modification process¹. The results of modeling are compared to the NJDEP health thresholds that are developed from numerous validated sources, and the ultimate impact of a project must be below these vetted health benchmarks for the permit to be approved. Therefore, the NJDEP should accept the air modeling results as required

¹ <https://www.state.nj.us/dep/aqpp/risk.html>, "Risk Screening Tools, Estimating Risk from Air Toxics"

under existing regulations to meet the requirement for evaluating environmental and public health stressor under air pollution. In addition, the NJDEP should clearly define the universe of conditions that may be applied to permit holders and allow consideration for reduction of environmental stressors as well as improvements to environmental and public health benefits.

In addition to air quality, land use, waste, water, and noise stressors will likely be considered. CCNJ/SRIN recommend that the NJDEP evaluate its own programs to identify the gaps within and determine what already exists as an established process that is effective in considering and addressing local and regional issues. For example, a metric is in place for Total Maximum Daily Loads (TMDLs) to prevent water quality impacts; there are also area-wide Water Quality Management Plans, Solid Waste Management Plans, delineated freshwater wetlands, and threatened and endangered species areas, to name a few. Also, the NJDEP's analysis should be a standard model to ensure consistency in approach across the state, and incorporate actual fence-line monitoring data that is readily available, in lieu of relying on model assumptions.

Looking at the NJDEP's current draft list of 31 total environmental and public health stressors, CCNJ/SRIN have serious concerns regarding how all of this data will be evaluated and quality controlled. It appears that the NJDEP is potentially proposing to utilize existing state and federal data sources and scale, and we strongly recommend that all source data be made publicly available and that it not be put into use in an EJ review process until it receives adequate stakeholder review, comment, and response. We do not recommend the utilization of any type of public survey data since it is not always the most appropriate or accurate way to collect information. We recommend that the NJDEP focus on environmental and public health stressors that can have a direct, independent impact to potential health outcomes versus ones that do not. Any potential public health impacts due to implied causation from any specific stressor should be removed as such health outcomes are the complicated result of various risk factors, and can be inter-related. Applicants should be scored higher in environmental and public health stressor categories (i.e. public health and social issues) for incorporating activities to increase the environmental and public health benefits in the overburdened community. An "Other Category" should be added to the EJ screening tool for the applicant to add positive activities that benefit the overburdened community by implementing mitigation measures to climate change, using clean energy alternatives, and implementing green infrastructure.

The EJ screening tool must be part of the proposed rule making process for the regulated community to clearly understand all of the environmental and public health stressors and how they interact with the identified eight (8) facility types in any given overburdened community. Until each individual data layer is created and the NJDEP is able to demonstrate to the regulated community how these layers will be compiled and used, it does not seem possible to properly assess and write rules.

Again, we support the NJDEP's statement that all environmental and public health stressor data will be made publicly available.

CCNJ/SRIN believe that several of the suggested stressors are redundant and/or inappropriate and, therefore, should be removed; these include the following:

- "Permitted air sites" (see slide 40 presented during the NJDEP's June 24, 2021 EJ rulemaking stakeholder meeting) – 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;

- “Truck Traffic” and “Warehouses” – This is redundant; and
- “Total Regulated Facilities under EJ Law” – This is redundant.

EJ Impact Statement (EJIS)

As we stated in our initial comments submitted on November 23, 2020, and also above under “Facility & Permit Definitions”, CCNJ/SRIN recommend an exclusion for projects that result in no net increase to the facility’s permissible emissions or discharges, or that actually decrease potential environmental impacts which reduces the overall environmental and/or health stressors in the overburdened community. The NJDEP should set impact thresholds below which an EJIS is not required, and clarify that applying for a permit required to perform preventative maintenance or emergency activities does not trigger this EJIS requirement.

Evaluating cumulative impacts is much more challenging without an established scientific method or existing validated community metrics. The NJDEP should ensure that any cumulative impact assessment is supported scientifically and proven in practice. The first step of the EJIS process, “Initial Screen”, seems to be flawed in that every overburdened community could possibly have more environmental and public health stressors than non-overburdened communities and, therefore, never be initially screened out. By definition, an “overburdened community” will have one or more socioeconomic stressors adding to its combined stressor total (CST). If this screening process serves no purpose, it should be adjusted to allow for a reasonable portion of permits to be screened from further consideration based on cumulative impacts, or eliminated. With the stressor data being readily available, the NJDEP should have the ability to pre-score all overburdened communities and determine how many will be screened out.

We have learned from the COVID-19 pandemic the importance of a virtual format to hold public meetings and have discussions. This provides an opportunity to reach all of the community for participation. It is important that the NJDEP incorporate virtual meetings as one of the mechanisms for the public meeting, as well as in-person meetings. Also, it is important to utilize social media platforms to communicate to the public, as well as newsprint and publicly available websites.

We support the publication of a basis and background document that specifically outlines the NJDEP’s expectations regarding what the EJIS will look like; however, the NJDEP should first circulate a draft document to stakeholders, and be accepting of and seriously consider all stakeholder comments, before finalizing.

Permit Conditions (New Facility, Facility Expansions/Title V Renewal) and Permit Application Evaluation

CCNJ/SRIN recommend that the NJDEP use basic and plain English definitions for “new facility” and “permit renewal”. A “new facility” is a newly sited facility or change in use of existing facility. A Title V “permit renewal” is continuation of existing operations. Also, an “expansion facility” is a facility that has performed a major modification as defined in the Clean Air Act.

Similar to what we stated above under “Facility & Permit Definitions”, an application for a covered permit/facility that does not result in a material net increase in environmental or public health stressors or that reduces stressors should not be subject to the EJ process.

In order to be equitable, the environmental impact analysis should include benefits as well as stressors. For instance, when the NJDEP promulgates the New Jersey Protecting Against Climate Threats (NJPACT) rules, the regulated community must document how Greenhouse Gases and Clean Air Act-regulated pollutants are being mitigated at their facility, which results in benefits to the environment and/or public health stressors in the overburdened community. CCNJ/SRIN recommend that the NJDEP incorporate regulatory language that allows future environmental regulations that mitigate environmental or public health stressors to be viewed as a benefit for the regulated community in the environmental impact analysis. Instead of solely focusing on a sum of all negative stressors, the NJDEP should clearly define the universe of conditions that may be applied to permit holders and allow consideration for reduction of stressors as well as improvements to environmental and public health benefits. Measures that exceed minimum regulatory requirements should also be considered as part of the cumulative assessment of stressors that may be present near covered facilities.

The NJDEP should define and/or provide examples of “conditions that avoid or reduce stressors” that are acceptable to the Department. CCNJ/SRIN strongly oppose the NJDEP imposing Best Available Control Technology (BACT)/State of the Art (SOTA) standards for Title V permit renewals. SOTA/BACT requirements will be burdensome and may not be the most cost-effective way to minimize potential health impacts. Actual health impact assessments should guide mitigation choices versus defaulting to the most expensive option; we urge the NJDEP to consider predictability and jobs in order for industry to stay in, expand in, and bring businesses back to NJ.

We urge the NJDEP to allow for flexibility in the rules with their acceptance of mitigation choices. 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.

As we stated in our initial comments submitted on November 23, 2020, the NJDEP should clarify that the EJ process can run concurrent with the permit renewal process. CCNJ/SRIN are concerned about the 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. To be eligible for the “application shield,” which prevents a Title V permit from expiring during review of a renewal application, the renewal application must be submitted and deemed administratively complete 12 months prior to expiration. The New Jersey EJ law does not give the NJDEP regulatory authority to override the USEPA’s regulatory authority to deem a Title V air permit “administratively complete”. Given the uncertain timeframe of the EJ process, which was confirmed with the NJDEP’s statement that it does not have a specific deadline to approve/deny, requiring the EJIS to be completed as a prerequisite for obtaining the application shield would create unnecessary logistical complications, unpredictability, and much longer timeframes for the Title V permitting process.

Compelling Public Interest

The NJDEP’s potential direction of defining compelling public need by modeling the Freshwater Wetlands Protection Act regulation seems to be appropriate. The Freshwater Wetlands Protection Act defines compelling public need as “that based on specific facts, the proposed regulated activity will serve an essential health or safety need of the municipality in which the proposed regulated activity is located, that the public health and safety benefit from the proposed use and that the proposed use is required to serve existing needs of the residents of the State, and that there is no other means available to meet the established public need.” The key words “serve an essential health or safety need of the municipality”

means a healthy community is one in which all residents have access to a quality education, safe and healthy homes, adequate employment, transportation, physical activity, and nutrition, in addition to quality health care. By bringing businesses to the overburdened community, we provide the essential social, economic, and environment triple bottom line to make a sustainable community. We are committed to reducing the environmental and health stressors and increasing the environmental and public health benefit in the communities in which we operate.

CCNJ/SRIN strongly oppose the NJDEP's position that it will not allow for economic benefits as justification for compelling public interest. As we stated in our initial comments submitted on November 23, 2020, tax revenue and jobs provided to people in the community, including direct, indirect, and induced, are a significant public benefit. Direct and indirect jobs created in the community as a result of a new facility increase income, directly mitigating two of the listed stressors, "Poverty" and "Unemployment" (#27 and 28, respectively, found on slide 47 presented during the NJDEP's June 24, 2021 EJ rulemaking stakeholder meeting). Needless to say, tax revenues fund essential government services to the benefit of the community. Community service and community support, such as volunteerism and grants to improve services or quality of life in the city and/or county, should also be taken into account.

Similar to our comments above regarding permit conditions, we urge the NJDEP to allow for flexibility in the rules with its decision-making process following a public hearing and comment period, with the option to defer to the appropriate community stakeholders. If the facility and the community agree that a project serves a compelling public interest, the enhanced public participation objectives of EJ have been achieved, and the NJDEP defer to those agreements. Also, the NJDEP's proposed permit conditions that do not originate from the current environmental permit regulations to mitigate environmental or public health stressors should be allowed as options that the facility and community can consider and discuss rather than being made a requirement.

Outreach & Engagement

We are disappointed that the NJDEP did not discuss meaningful engagement at all during the June 24, 2021 stakeholder meeting. As we stated in our initial comments submitted on November 23, 2020, many of our CCNJ and SRIN member companies participate in Community Advisory Panels (CAPs) where industry, community members, first responders, and elected officials come together to communicate and be transparent with one another. We believe that CAPs are a successful way to address community concerns and share information about nearby manufacturing facilities. Enhanced communication is one of the hallmarks of EJ. As a result, for both the impact assessment and public hearing processes, the NJDEP should recognize and incentivize those companies that are already engaged with their communities in a meaningful and effective way. CCNJ/SRIN believe that 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 suffice as an acceptable public process in lieu of public hearings. In addition, CCNJ/SRIN are committed to reinvigorating CAP participation and expand their services to more EJ communities in New Jersey.

CCNJ/SRIN and its members remain committed to being solution providers that help the state reach EJ goals that are achievable and not arbitrary, while protecting the investments made by business of chemistry companies employing more than 40,000 people in New Jersey.

We would like the record to reflect our support of any comments submitted separately by members of CCNJ and SRIN.

Thank you for your consideration of our comments on this very important rulemaking effort. Again, we strongly urge the NJDEP to seriously consider our pre-proposal comments before finalizing any rule language. CCNJ/SRIN also request to schedule a meeting with you prior to the publication of the rule proposal to further discuss our concerns and recommendations. If I can be of further assistance, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to be 'D Hart', with a long horizontal flourish extending to the right.

Dennis Hart
Executive Director

Attachment