



June 1, 2021

**VIA ELECTRONIC FORMAT**

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Alice A. Previte, Esq.

Attn: DEP Docket Number: 02-21-01

Office of Legal Affairs

New Jersey Department of Environmental Protection

401 East State Street, 7th Floor

Mail Code 401-04L

PO Box 402

Trenton, New Jersey 08625-0402

Re: Comments on NJDEP Proposed Amendments to Permit and Reporting Requirements for Fumigants and Other Hazardous Air Pollutants, N.J.A.C. 7:27, 7:27A (DEP Docket Number 02-21-01, Proposal No. PRN 2021-020)

Dear Ms. Previte,

On behalf of our members, the Chemistry Council of New Jersey (CCNJ) appreciates the opportunity to provide comments to the New Jersey Department of Environmental Protection (NJDEP, Department) on the Proposed Amendments to the Permit and Reporting Requirements for Fumigants and Other Hazardous Air Pollutants published in the New Jersey Register on March 1, 2021 (Proposed Amendments). The Proposed Amendments present widely sweeping changes to the regulation of fumigants and fumigation operations that will impact a range of industries beyond fumigation.

The Proposed Amendments, among other things, aim to regulate fumigants and fumigation operations based on an extremely low permit applicability trigger, such that virtually all, if not all, fumigation operations in New Jersey will be subject to air permitting requirements, when these operations have never required an air permit before. This significant rule change, based on overly conservative assumptions, will result in a major disruption to almost every business in New Jersey, will substantially increase the cost of compliance, and will result in industries leaving the state without any justification or quantification by the Department of a reduction of risk to public health or the environment. In addition, the Proposed Amendments did not result from a formal rulemaking stakeholder process and have significant unintended consequences that will unleash unnecessary burden on businesses throughout the state.

Furthermore, the NJDEP initially only proposed a two-month comment period. In light of the significant nature of the Proposed Amendments, CCNJ submitted a request to stay the Proposed

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Amendments, or to extend the public comment period, at a minimum, for another 90 days to July 29, 2021. The Department only granted an extension for 30 days to June 1, 2021, which we do appreciate, however, we are deeply disappointed that the ability to provide meaningful comments is still limited by a narrow time period, especially since the work product presented is deserving of careful review by all interested parties. Our members need adequate time to fully understand the implications of the Proposed Amendments as many will be negatively affected in a substantial way, which the NJDEP needs to realize. It is critical that all impacted stakeholders be given enough time to thoroughly develop comments.

Ultimately, the Proposed Amendments sacrifice the use of sound judgement and thorough consideration, and CCNJ strongly urges the NJDEP to withdraw the Proposed Amendments in their entirety from consideration of adoption and initiate a stakeholder process that includes creation of workgroups dedicated to specific contaminants and/or industries. For example, a stakeholder workgroup focused on the fumigant/fumigation operations piece of the Proposed Amendments could have a transparent, productive discussion with the Department and work collaboratively to ensure that applicability, the permitting process, and any required emission mitigation is based on the best available science and a practical understanding of all fumigation operations. The permitting structure must be practical and recognize the differences in fumigation types. The Proposed Amendments as-is are an inappropriate way to manage these emissions and protect bystanders. CCNJ and other stakeholders are more than willing to help educate the NJDEP on how the actual fumigation process works in New Jersey and how the various industries can address any concerns from a toxicological, regulatory, or practical application standpoint.

**The Requirements for Rulemaking, as Codified in the Administrative Procedure Act (APA), Were Not Followed.**

The Proposed Amendments were issued without any discussions with the professionals in the food production sector, bakeries, commodities brokers, port cargo handlers, the fumigation industry, or any other impacted industries. In addition, it appears that the New Jersey Department of Agriculture and even the NJDEP's own pesticide regulatory program were not consulted in recent discussions during drafting of the Proposed Amendments. During the April 8, 2021 public hearing on the Proposed Amendments, it was evident that the municipal utilities authorities were also caught off guard since numerous municipalities testified in opposition; not one stakeholder testified in support of the Proposed Amendments.

On January 17, 2019, the NJDEP held its one and only rulemaking stakeholder meeting, which did not include all impacted industries. During this meeting, the NJDEP discussed the following: (1) their consideration of adding hydrogen sulfide, sulfuryl fluoride, and n-propyl bromide to the list of Hazardous Air Pollutants (HAPs) and Toxic Substances (TXS); (2) their plans to amend

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Subchapter 27 and 27A to clarify air permit applicability for fumigation operations and to further evaluate appropriate protective measures; and (3) their consideration of requiring the reporting of additional substances on Emission Statements. On February 1, 2019, CCNJ, along with the New Jersey Business & Industry Association (NJBIA), submitted written comments (attached) to the NJDEP expressing our concerns regarding the absence of a real public health issue as the Department was unable to articulate a reasoned basis for adding the three above-mentioned substances to the HAP/TXS lists or demonstrate that current regulations are inadequate. We highlighted the fact that there are no peer-reviewed studies validating any existing public health concern and that these industries already operate in compliance with extensive regulations under the NJDEP, the United States Environmental Protection Agency (USEPA), the Occupational Safety and Health Administration (OSHA), and the United States Department of Agriculture (USDA) that protect public health and safety during fumigant use. CCNJ/NJBIA shared significant issues with the NJDEP's plans to regulate fumigation operations, specifically the lack of flexibility with expedited timeframes, the lack of emergency exemptions, and the substantial business disruption that will result with no benefit to public health or the environment. We also commented on the discussion regarding Emission Statements. It is important to note that, at no point during the January 17, 2019 stakeholder meeting did the NJDEP mention or even hint at its intent to define "fumigant" as any "pesticide" registered with the USEPA under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

For some reason, the normal NJDEP rulemaking stakeholder process was not followed for the Proposed Amendments. As a result, there are various technical errors, missing information, and a significant lack of understanding from the Department of the substantial negative impact and unintended consequences on almost all New Jersey businesses. CCNJ firmly believes that a stakeholder process with transparent and open-minded dialogue will help determine how best to address the NJDEP's concerns while also protecting the import/export markets, the food supply, and jobs in the state. Absent this stakeholder process, New Jersey faces losing, at the very least, a great deal of port business to other states, in addition to food processing businesses and commodities industries.

It is also worth highlighting the APA requirement to include a sufficient enough analysis on the agricultural impacts of the rule proposal for the state Agriculture Development Committee to evaluate and determine any need for a consultation and/or modification; this information was lacking in the Proposed Amendments.

Consequently, the rulemaking did not adhere to the requirements of the APA and applicable Executive Orders, which hindered the public's opportunity to comment and their due process rights to participate in the rulemaking process as required by the APA.

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The Proposed Amendments should be withdrawn and re-proposed in full compliance with the statutory, regulatory, and legal requirements of the APA.

**The NJDEP's Definitions of "Fumigant", "Fumigation", and "Industrial Structure" Are Overly Broad.**

The Proposed Amendments define "fumigant", "fumigation", and "industrial structure" in an overly broad way that will implicate almost every building in New Jersey that is not residential. If the NJDEP's intent is to focus on methyl bromide, sulfuryl fluoride, and phosphine, this should be stated vs. the currently proposed definition of "fumigant" as any "pesticide" registered under FIFRA.

The Proposed Amendments should be withdrawn and re-proposed with new, more specific definitions and applicability.

**The NJDEP Fails to Consider the Significant Impacts the Proposed Amendments Will Have on Businesses in New Jersey.**

The NJDEP's economic and jobs impact statements are completely inadequate and inaccurate. The Proposed Amendments, specifically the extremely low Potential to Emit permitting trigger and vertical stack requirements, will have a significant impact on the many different types of industries and commerce that rely on fumigation as a critical component of their pest control programs. As written, the Proposed Amendments will result in the fumigation and warehousing industry leaving New Jersey and, following them, will be the industries and commerce that fumigators enable to function. Whether fumigators leave the state or stay and are forced to comply with the proposed requirements, the cost of fumigation will increase considerably for the manufacturing industry and, as a result, they may not be able to continue operating here. The Proposed Amendments are truly unattainable for many companies in various situations. Next to leave the state will be the associated processing operations and manufacturing facilities as they will follow the fumigators. There is a critical need to preserve the manufacturing facilities, such as the pasta plants and other food processing companies, in New Jersey because, without them operating in the state, a potential food security impact will likely develop.

It is important to note that many companies find it a challenge to operate in New Jersey already, and additional hurdles, costs and uncertainties will further hamper our efforts to bring investment and product lines into the state. Companies not only compete against other companies, but facilities within companies compete against each other; facilities in New Jersey are competing against facilities in Pennsylvania, Ohio, and Michigan, which do not have similar hurdles to face, when their companies are deciding to continue operations and expand a facility. Companies in New Jersey are also competing with imports from companies operating abroad. New Jersey needs to keep these critical companies that provide essential services operating in our state. Investment and product lines are what drive job growth, a valuable asset to any

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community. Investing in existing facilities should be encouraged rather than discouraged because communities benefit from modernized operations, as well as the construction and permanent jobs created by new local investment. We must continue to reiterate that the NJDEP has not pointed to any actual concerns or negative impacts from the existing business operations that these regulations are purported to rectify.

The Proposed Amendments should be withdrawn and re-proposed with a more thorough and detailed economic analysis.

### **The NJDEP Fails to Identify Pesticide Regulation Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).**

It is evident from a review of the Proposed Amendments, and the testimony at the April 8, 2021 public hearing, that the NJDEP does not fully understand how the various impacted industries operate in New Jersey nor is aware of the other federal and state regulatory agencies involved in overseeing public and environmental safety during the necessary fumigation of commodities, food processing facilities, timber, clothing, perishable food, and other products.

In addition, CCNJ is very concerned about the state's own efforts in eradicating the invasive Spotted Lanternfly infestation, which would be hampered by the Proposed Amendments.

It is evident that the NJDEP does not fully understand how fumigation actually works in the state, and CCNJ and other stakeholders are willing to help educate the Department as this would be a mutual benefit. The Proposed Amendments are not the most efficient or appropriate way of regulating fumigants; any permitting or reporting threshold must be based on sound science, and the permitting structure must be practical and recognize the differences in fumigation types.

The Proposed Amendments should be withdrawn and re-proposed following a transparent, comprehensive stakeholder process, which should include impacted industries educating the NJDEP on the extensive regulations they are currently required to adhere to.

### **The NJDEP Fails to Identify Existing Control Measures at Chemical Facilities.**

The Proposed Amendments will impact companies such as refineries and chemical plants, which have already committed to invest in extensive measures to protect their workers and neighbors from hydrogen sulfide exposure. There will be no public health or environmental benefit from further regulating this substance. These impacts were not addressed at the January 17, 2019 stakeholder meeting and, as CCNJ/NJBIA recommended on February 1, 2019, should have been considered in the proposed rulemaking.

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The Proposed Amendments should be withdrawn and re-proposed with the exclusion of those facilities that are already adequately controlling their emissions.

**The NJDEP Does Not Have the Resources to Efficiently Process Additional Permit Applications, and Fails to Honor a Permit Shield.**

CCNJ is deeply concerned about the NJDEP's ability to review all of the additional permit application submittals that will result from the Proposed Amendments. We do not believe that there is an adequate number of staff/resources to process these permits in a timely manner, especially given the Department's current backlog.

In addition, the NJDEP fails to enact a permit application shield, which would prevent an applicable permit from expiring during review of a renewal application, as long as the renewal application is submitted and deemed administratively complete twelve (12) months prior to the expiration date. As a result, pending permits for fumigation activities have been stalled in the process, and these facilities have not been able to continue their critical operations without imposition of fines, which is forcing them to seriously consider leaving the state altogether.

The Proposed Amendments should be withdrawn and re-proposed with an evaluation on the impacts of the NJDEP being inundated with additional permit applications.

Again, CCNJ strongly urges the NJDEP to withdraw the Proposed Amendments in their entirety from consideration of adoption and initiate a stakeholder process that promotes transparent and productive discussions.

On behalf of our CCNJ members, I thank you for your review of our comments and consideration of our concerns and recommendations. Together, we believe we can work collaboratively to both be protective and allow businesses to continue to operate in the state and provide benefits to the citizens of New Jersey.

Sincerely,

A handwritten signature in black ink, appearing to be "Dennis Hart", written in a cursive style.

Dennis Hart  
Executive Director

Attachment