

New Jersey Takes Action Toward Environmental Justice

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While no one is immune from the coronavirus, the COVID-19 pandemic has disproportionately affected minority and low-income communities. Concurrently, across the country sustained protests call for an end to racial inequality. Environmental justice, which the U.S. Environmental Protection Agency defines as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies,” is essential to achieving this goal and ensuring that people living in Black and Brown communities have access to clean air, clean water, safe outdoor recreation, healthy food and protection from pollution.

New Jersey Legislation Addresses Pollution in Overburdened Communities

On Sept. 18, New Jersey made environmental justice history when Gov. Phil Murphy signed into law S-232 (the act) that requires the New Jersey Department of Environmental Protection (DEP) to consider the environmental and public health implications of certain facilities on “overburdened communities.” Most notably, the law requires that the DEP must deny a permit for a new facility or expansion of an existing facility, or apply new conditions to the renewal of an existing Clean Air Act major source permit, if the DEP finds that approval or renewal of the permit 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.”

The DEP is required to publish within 120 days a list of overburdened communities, defined as a census block group in which at least 35% of households qualify as low-income, 40% of residents identify as minority or 40% of households have limited English proficiency.

The act adds the requirement of an environmental justice impact statement to applications for new facilities, or expansion of existing facilities, including those that are major sources of air pollution, sewage treatment plants, scrap metal facilities, landfills and solid waste facilities. The environmental justice impact statement, which will be subject to public hearing and comment, is required to assess the “potential environmental and public health stressors associated with the proposed new or expanded facility, or with the existing major source, as applicable, 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.”

As with many significant regulatory changes, the environmental justice impact statement requirement raises several questions. For example, what is the required scope of the environmental justice impact statement? How broadly must cumulative impacts be construed? If a permit applicant identifies that its proposed facility will result in an environmental stressor, is

the applicant required to provide an analysis, including a cost-benefit analysis, of potential alternatives? Will the findings of the environmental justice impact statement require that a certain action be taken or not taken, or, like the environmental impact statement requirement of the National Environmental Policy Act, are applicants required only to take a “hard look” at the environmental justice implications of its proposed facility?

If the DEP provides sufficient detail in the rules and regulations adopted in accordance with the act, or any technical guidance offered for compliance with the act, the environmental justice impact statement will prove an effective tool for identifying, and potentially avoiding, environmental stressors and creating environmental benefits.

NJ’s Regulatory Approach to Environmental Justice

Shortly after taking office, Murphy signaled his prioritization of environmental justice with the issuance of Executive Order No. 23 on April 20, 2018. In the Executive Order, Murphy instructed the DEP to “take the lead in developing guidance for all Executive Branch department and agencies for the consideration of environmental justice in implementing their statutory and regulatory responsibilities.”

In accordance with the governor’s direction, last month the DEP published “Furthering the Promise: A Guidance Document for Advancing Environmental Justice Across State Government” (guidance). The guidance provides a framework for each agency within the Executive Branch to think critically and evaluate the ways in which its functions are part of the environmental justice equation.

An important first step for New Jersey is to clearly identify the environmental justice communities, and the DEP established three criteria to do so. The first criteria for designating an environmental justice community is identifying the “communities of concern.” This term appears intended to apply broadly to include not only the “overburdened communities” as defined in the act discussed above, but also considers other demographic factors relevant to the analysis. For example, the guidance explains the factors include, among other metrics, the rate of households without a car, the social vulnerability index and moderate income households.

The next step is to “assess a community’s level of environmental and public health stressors.” These “stressors” include disproportionate sources of pollution such as high concentrations of stationary and mobile sources of air pollution, proximity to contaminated sites, waste treatment facilities, recycling facilities, poor water quality, and “conditions that may cause potential public health impacts, including, but not limited to, asthma, cancer, elevated blood lead levels, cardiovascular disease and developmental problems.”

The final criteria New Jersey will apply is the lack or absence of environmental or public health benefits such as abundant parks, safe bicycle and walking paths, and access to nutritious food, public transportation, and clean energy alternatives.

Identifying these environmental justice communities is essential for state agencies to understand how their programs or actions may contribute to conditions creating environmental stressors or limiting environmental benefits. The DEP proposes to cultivate such awareness through trainings and workshops conducted by experts within government and local environmental justice advocates.

While raising awareness of environmental justice issues within government is important, meaningful progress can be made when communities are empowered to have a voice through increased public participation. The DEP recognizes that communities of concern, “must be afforded the right to participate as equal partners at every level of the decision-making process, including needs assessment, planning, implementation and evaluation.”

There are many benefits of increased participation in the public process, including better informed decision-making. Implementing this directive will likely require significant modifications to the ways in which the Executive Branch is accustomed to operating. New Jersey has an opportunity to lead by example in developing policies and procedures designed to advance environmental justice. Critically, the DEP highlights that “ongoing efforts must be made to ... ensure the staff of our Executive Branch, as well as the members of its boards, councils, and commissions, must continuously strive to include more diverse representation from the communities we serve.”

This is an important point that recognizes the distinction between inviting a community to influence the decision-making process from the outside through public participation, and empowering a community by integrating its members into the decision-making body. Not only does this strengthen the decision-making process and resultant policy, it provides a stable source of employment for members of communities of concern.

To prepare for this change in operation and to “institutionalize” the environmental justice successes and improvements, each state agency will be completing an initial assessment of its environmental justice impact to provide the groundwork for Executive Branch action plans. The initial assessments require agencies to think about their relationship to natural resources, the ways in which they can contribute to the reduction of stressors or the promotion of environmental and public health benefits. Agencies are also being asked to identify its current public outreach methods, to identify gaps in outreach to communities of concern, and ways to incorporate public feedback into decision-making processes.

The state agencies’ draft action plans will be available for public comment 120 days after the COVID-19 public health emergency is lifted. This will be an important opportunity to help write the rules in which communities of concern will be permitted to participate in decision-making processes.

The legislative and regulatory actions taken last month, in addition to 12 environmental justice lawsuits filed in August by the state against alleged polluters in low income and minority communities, demonstrate that remedying decades of inequality requires a multifaceted approach and an all-in commitment from every level of government. New Jersey has an opportunity to position itself as an environmental justice leader, and other states serious about promoting environmental justice will surely be able to learn valuable lessons from New Jersey's example.

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